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IN THE

# Supreme Court of the United States

**October Term, 1967**

No. [redacted] 14

COMMONWEALTH COATINGS CORPORATION,
*Petitioner,*

-v.-

CONTINENTAL CASUALTY COMPANY, FIREMAN'S FUND INSURANCE COMPANY AND A. C. SAMFORD OVERSEAS, INC.,
*Respondents.*

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*On the Brief*

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## QUESTION PRESENTED

Were the District Court and the Court of Appeals not correct and justified in holding that under the Federal Arbitration Act an arbitration award should be confirmed (and not automatically vacated as contended by the objecting party where there have been previous business relations between an arbitrator and a party, irrespective of any other considerations) when:

(a) The business relations were remote, isolated, casual and insubstantial, and occurred a year or more prior to the arbitration proceedings;

(b) No inquiry was made of the party or the arbitrator about business relations although the objecting party (a subcontractor), whose counsel was a close personal friend of the arbitrator, knew the respective businesses of the arbitrator (performing engineering consulting services for the construction industry) and the party (a general contractor), knew these businesses were closely related (the firm with which the arbitrator was associated having performed engineering consulting services for most of the contractors in the area), knew of the prominent reputation of the arbitrator in his field, and knew of the substantial business engaged in by the party in the area;

(c) The objecting party admitted that such business relations had no effect on the honesty or integrity of the arbitrator and that the arbitrator did not act improperly in any way, therefore admitting that such business relations had no effect on the arbitration proceedings or the award; and

(d) The arbitration proceedings were in fact conducted in a fair and impartial manner?

## STATEMENT OF THE CASE

### 1. Proceedings Below

Petitioner, Commonwealth Coatings Corporation, on November 26, 1962, filed two suits, Civil Actions Nos. 441-62 and 442-62, in the United States District Court for the District of Puerto Rico against Respondents, Continental Casualty Company (hereinafter sometimes referred to as "Continental") and Fireman's Fund Insurance Company (hereinafter sometimes referred to as "Fireman's Fund"). R. I, 1; II, 50. Civil Action No. 441-62 was brought separately as a Miller Act suit under 40 U.S.C.A. §270(b). Both actions were brought by Petitioner as a subcontractor of Respondent, A. C. Samford Overseas, Inc. (hereinafter sometimes referred to as "Samford") on six large construction projects in Puerto Rico,[1] which Samford was constructing as general contractor, against Continental and Fireman's Fund as the construction sureties of Samford, alleging that Samford had breached the subcontracts and praying for damages under the surety bonds.

Prior to the bringing of these suits, upon the total abandonment of work on five of the projects by Petitioner during June and July, 1962, and the resulting termination of Petitioner as a subcontractor on the projects, Respondent Samford had demanded arbitration of the disputes between Petitioner and Samford

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[1]Although Action No. 441-62 included a count seeking damages on the subcontract between Petitioner and Respondent Samford on the Ionospheric Research Facilities Project for the United States Government in Arecibo, Puerto Rico, (R. I, 1(4)), the matter was resolved and was not an issue in the subsequent arbitration and litigation.

under the arbitration clauses present in the subcontracts, and Petitioner and Samford had agreed to the resolution of the disputes by arbitration. A. 31, 69-70. Upon motions by the defendants in said actions, the actions were stayed by the District Court on March 12, 1963, pending the outcome of the arbitration proceedings.[2] A. 3, 13.

Hearings were had before a panel of three arbitrators commencing August 14, 1963, and continuing through August 18, 1963, when the hearings were recessed until August 31, 1963. On August 31, 1963, the hearings were resumed and continued through September 3, 1963, when the hearings were adjourned. A. 63. In the arbitration proceedings Samford asserted its claim that Petitioner had breached the subcontracts, not Samford, and claimed damages resulting from the breach.

On November 12, 1963, the arbitrators issued their unanimous written arbitration award in favor of Samford and against Petitioner for $15,872.35. A. 30-35.

On January 24, 1964, Respondents Continental and Fireman's Fund in Actions Nos. 441-62 and 442-62 filed motions to dismiss said actions on the basis of the issuance of the arbitration award in favor of their principal obligor, Samford. A. 4, 14.

On February 7, 1964, Petitioner filed a petition and motion verified February 1, 1964, in Civil Action No. 65-64 against Respondent Samford to vacate the arbitration award. A. 21, 36-53. On February 28, 1964, the Dis-

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[2]Decision reported, *U.S. for Use and Benefit of Commonwealth Coatings Corp. v. Continental Cas. Co.*, 214 F.Supp. 949 (D.C.P.R. 1963).

trict Court stayed further proceedings in Civil Action No. 65-64 until further order by the United States District Court for the Southern District of New York in Action No. 63-B-903, which had issued a stay of all litigation against Respondent Samford. On June 15, 1965, Petitioner filed a supplemental petition and motion, verified May 6, 1965, in Civil Action No. 65-64 to vacate the arbitration award and set the matter for trial. A. 22, 55-61. Samford thereupon filed its Response, Answer and Counterclaim in Civil Action No. 65-64 on July 8, 1965, praying for confirmation of the award and entry of judgment for Samford. A. 23, 62-73.

Hearings of the motions pending in Civil Actions Nos. 441-62, 442-62 and 65-64 were had in the United States District Court for Puerto Rico on June 25, 1965 and July 16, 1965. A. 5-6, 15-16, 23-24. On January 4, 1966, the District Court of Puerto Rico formally consolidated Civil Actions Nos. 441-62, 442-62 and 65-64 for trial and all proceedings thereafter, and denied the motions of Respondents Continental and Fireman's Fund in Civil Actions Nos. 441-62 and 442-62 for dismissal of the complaints and ordered that the stay order issued by the District Court in both cases on March 12, 1963, remain in full force and effect until the issues raised in Civil Action No. 65-64 challenging the arbitration award were tried and decided on the merits; Petitioner's motion to vacate the arbitration award was ordered left in abeyance until a final decision was rendered on the merits by the District Court. A. 83-85.

On February 14, 1966, the three cases were called for trial, and testimony and argument of counsel were presented by the parties. A. 17-18, 86-183. The District

Court issued its memorandum and judgment confirming the award on September 30, 1966, determining that the hearings were fair and impartial, and ordering that Samford recover $15,872.35 from Petitioner with costs.[3] A. 184-187. Petitioner filed notice of appeal in all three cases October 27, 1966. A. 9, 19, 28.

The United States Court of Appeals for the First Circuit heard argument of the cases on September 11, 1967, and on September 27, 1967, rendered its unanimous decision affirming the judgment of the District Court.[4] A. 192-195.

On December 21, 1967 Petitioner filed its Petition for Certiorari with this Court. Respondents on January 20, 1968, filed their Brief in Opposition to the Petition for Certiorari. On February 16, 1968, Petitioner filed a Reply Brief, and on March 11, 1968, the Petition for Certiorari was granted. On April 5, 1968, Respondents filed their Petition for Rehearing, and on April 22, 1968, the Petition for Rehearing was denied.

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[3]This decision is not reported.

[4]Decision reported, *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 382 F.2d 1010 (1967).

**2. Statement of Facts**

a. *The Parties and their Contracts*

Respondent, A. C. Samford Overseas, Inc., a Georgia corporation (A. 40), was the general contractor for the construction of the following five large building projects in Puerto Rico, which are involved in this appeal:

1. Aguadilla Housing Project in Aguadilla, Puerto Rico, under contract dated May 18, 1960, with the Puerto Rico Urban Renewal and Housing Corporation;
2. Dr. I. Gonzalez Martinez Oncologic Hospital under contract dated December 4, 1959, with the Board of Trustees of the Puerto Rican League Against Cancer;
3. The Central Power Plant & Laundry in Rio Piedras, Puerto Rico, under contract dated August 18, 1960, with the Provisional Board of the Puerto Rico Medical Center;
4. The Rehabilitation Center in Rio Piedras, Puerto Rico, under contract dated November 23, 1960, with the Provisional Board of Puerto Rico Medical Center; and
5. The Wherry Housing Modification and Improvement at Ramey Air Force Base in Puerto Rico under contract dated November 23, 1960, with the United States of America. A. 30-31, 41.

The amounts of these contract prices totalled over $9,000,000.00. Samford also was performing other construction contracts in Puerto Rico. R. I, 1 (4).

During 1960 and 1961 Petitioner, Commonwealth Coatings Corporation, a Puerto Rico corporation specializing in painting on construction projects in Puerto

Rico (A. 40), and Respondent Samford entered into five subcontracts under which Petitioner was to perform all of the painting work on the above five projects. The total of the subcontract prices was $351,938.00. A. 33. Petitioner's performance of the subcontracts was bonded by Maryland Casualty Company. A. 68. Two of the three principal owners of Petitioner, Mr. Stein and Mr. Marcus, were from New York. A. 94. Petitioner was also performing other painting work for Samford and others in Puerto Rico. R. I, 1 (4).

Petitioner commenced the painting work on the projects; however, disputes arose between the parties concerning performance of contractual obligations. Samford claimed that Petitioner had breached the subcontracts to the damage of Samford by Petitioner's failure to perform timely and correctly all of its duties under the subcontracts. A. 31, 72. Petitioner fell behind in the required completion schedule, began to make major errors in performance, such as painting buildings with the wrong paint, began to omit certain required work, failed to provide sufficient workmen, failed to pay for paint and supplies as required, and finally, instead of continuing performance and arbitrating any disputes it had with Samford, as required under the arbitration clause in each subcontract,[5] during June and July, 1962, Peti-

[5]Each of the subcontracts contained the following arbitration clause: "If any question of fact shall arise under this contract, either party hereto may demand an arbitration by reference to a Board of Arbitration, to consist of one person selected by Contractor, and one person selected by Sub-contractor, these two to select a third, and in case these two fail to select a third within three days, he shall be named by the Architect or his authorized representative. In case either Contractor or Sub-contractor fails

tioner completely abandoned the painting work on all five projects. A. 31, 69. Pursuant to the default provisions of the subcontracts, Samford terminated the subcontracts and was required to complete the painting work of Petitioner at great extra cost to Samford. A. 31, 71-72. Petitioner had been paid $209,502.49 under the subcontracts before abandoning all of its work on the five projects. A. 33-34.

Immediately following the walk-off by Petitioner and the termination of the subcontracts, arbitration was demanded by Samford pursuant to the arbitration clauses of the subcontracts as a means of resolving the disputes. A. 31, 57-58, 69-70. Petitioner then also demanded arbitration, and the parties started selecting arbitrators. A. 47. Samford selected Dwight L. Chapman as its arbitrator. A. 32. Petitioner designated Pedro Pons, who later resigned or refused to serve.

b. *The Commencement of Litigation; the Arbitrators*

Rather than commence the arbitration proceedings,

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to name an arbitrator within three days after requested to do so, the Architect, or his authorized representatives, shall name an arbitrator to represent the party so failing to name one. The written decision of any two of this Board shall be final and binding on both parties hereto. Each party shall pay one-half of the expenses of such reference. Arbitration of a demand or decisions by the Architect or Owner shall be made within 5 days following notification to Sub-contractor of such demand or decision, otherwise Sub-contractor shall be bound thereby, unless the Owner shall agree to arbitration after that period. Provided, nothing contained herein shall excuse Sub-contractor from completion of the work in the manner provided in this contract nor shall the pendency of any dispute or arbitration proceeding excuse any delay, deficiency, default, or noncompliance therewith." A. 46-47.

however, Petitioner brought, in the District Court of Puerto Rico, Civil Actions Nos. 441-62 and 442-62 against Respondents, Continental Casualty Company and Fireman's Fund Insurance Company, the construction sureties for Samford on the performance and payment bonds furnished on the various projects. R. I, ¶ (2); II, 50 (2, 4, 6, 8). The sureties filed motions to stay the actions under the Federal Arbitration Act and the Arbitration Act of Puerto Rico to await the outcome of the arbitration proceedings. A. 3, 13. Each side filed two briefs (R. XVI, 149, 150, 152, 153), two briefs on behalf of Petitioner were filed by its former attorney, Robert H. Ruskin, as amicus curiae (R. XVI, 151, 154) a hearing was had, and the District Court stayed the actions by its order of March 12, 1963.[6] A. 3, 13.

Following the stay order, Petitioner selected as its arbitrator a Puerto Rico attorney by the name of Holman. A. 145. Samford's arbitrator who had earlier been selected, Mr. Chapman, and Mr. Holman named as the third arbitrator Jose L. Capacete. A. 66, 145. Before hearings could be commenced, however, Mr. Holman died. A. 66, 145. Petitioner then selected as its arbitrator to fill the vacancy, Hector Martinez Munoz. A. 66, 145-146. Samford had consented to this procedure for the filling of the vacancy on the board in lieu of applying to the District Court for appointment of an arbitrator. *Infra*, at 56-62.

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[6]See Note 2, *supra*.

**Highly Qualified and Respected Professionals Served as Arbitrators**

Hardly a more well-qualified board of arbitrators could have been selected to arbitrate a construction dispute. Mr. Chapman was a graduate engineer with 30 years of service for the Corps of Engineers as a civilian engineer, acting principally in the capacity of contracting officer on government construction projects. A. 104-105. Upon retirement Mr. Chapman had made his permanent home in Puerto Rico where he had previously performed much of his services with the Corps of Engineers and began a private engineering consulting business in which he was well known and respected. R. III, 116 (4-5).

Mr. Martinez was a well-known San Juan attorney and incidentally a professional colleague and friend of the attorney for Petitioner, Carlos Romero Barcelo. A. 66.

Mr. Capacete was one of the most eminent professional consulting engineers in Puerto Rico; he was a professor of engineering at the University of Puerto Rico and majority owner and an officer of Foundation Engineering Company of Puerto Rico and a member of the architectural firm, Capacete, Martin & Gutierrez. A. 66, 81, 141-142. The history of Foundation Engineering Company amply reveals its importance in the field: Foundation Engineering Company prior to 1957 was the only engineering consulting firm in Puerto Rico performing such consulting services; between 1957 and 1959 there were only two such companies in Puerto Rico and up to 1959 and 1960 Foundation Engineering Company was the larger of the two companies; after 1959, there were three firms performing such engineering con-

sulting services in Puerto Rico, one other of which performed approximately the same amount of business as Foundation Engineering Company. A. 141-142.

c. *The Arbitration Proceedings*

Upon the issuance by the District Court of the stay of the actions, the arbitration commenced on August 14, 1963. A. 3, 13, 63. At the request of the arbitrators each side presented a statement of issues. A. 108-109. At the opening of the arbitration proceedings, the parties mutually agreed that all questions of fact and law regarding the disputes between the parties would be submitted to the arbitrators for decision. A. 32-33. Prior to the hearings Petitioner had served interrogatories on Samford and answers were duly provided by Samford. A. 98.

The hearings lasted for a total of approximately ten days, and an estimated 90 hours of testimony were taken. A. 92. The first session of the hearings continued until August 18 when the hearings were suspended to August 30; the hearings were then resumed and were finally concluded on September 3, 1963. A. 63. Samford contended that Petitioner had breached the subcontracts by not performing its obligations under the subcontracts, by performing poorly (painting buildings the wrong color, failing to paint in the more difficult areas, such as behind shrubbery, etc.), falling behind schedule, not manning the projects with sufficient forces, omitting required work, failing to pay its suppliers in a timely fashion as required by the subcontracts, making representations to Samford that payment to suppliers had been made when such payment had not in fact been made, and finally completely defaulting by abandoning the

painting work on all five projects. A. 31, 72; R. III, 116 (2). Petitioner claimed that Samford did not make progress payments as they allegedly became due. A. 31, 43. However, Petitioner had been paid $209,502.49. A. 33-34. Further Petitioner's gross default and deficient performance also caused Petitioner to be due no further payment.

Both parties were represented by counsel. Petitioner was ably represented by Robert H. Ruskin, a Harvard Law graduate, who practiced in Puerto Rico, and Carlos Romero Barcelo of San Juan, a graduate of Yale University and the University of Puerto Rico Law School, and Max E. Greenberg of New York City, a well-known attorney and recognized expert in the area of construction law. A. 97. Subsequently in the proceedings and trial in the District Court, Petitioner was also represented by Alvin L. Korngold of the New York Bar. A. 75, 87. Samford was represented by Federico Ramirez Ros of San Juan and Overton A. Currie and Edward H. Wasson, Jr. of Atlanta, Georgia.

The hearings were conducted much in the nature of a trial. Petitioner had propounded pre-trial interrogatories to Samford which had been answered. During the trial the moving party, Petitioner, presented its evidence first, followed by cross-examination by Samford. Samford then presented its evidence followed by cross-examination by Petitioner. Counsel for both parties made oral summations of their cases on the last day of the hearings. The arbitrators in the course of the hearings ruled on various procedural matters including the admissibility of various types of evidence offered by the parties and generally adhered to those rules of evidence followed by the courts on the admissibility of evidence. R. III, 116 (7).

Few objections were made by either party during the hearings to any of the procedural decisions made by the arbitrators. No objections were renewed at the end of the hearings. No motions were made by either party at the conclusion of the hearings to allow further evidence, cross examination or arguments. A. 93-94; R. III, 116 (8).

Hundreds of documents were offered in evidence by the parties in support of their positions. The oral hearings, which had been recorded by court reporters on magnetic tapes, lasted for such a length of time that to type the entire record became excessively expensive, and the parties determined that the best alternative would be to have the tapes recording the hearings preserved by the court reporters, Crespo & Rodriguez of San Juan, for future use. R. III, 116 (8). Since the hearings several portions of the tapes were transcribed, and these transcripts[7] were filed with the District Court at its request. A. 27; 170, 174.

Following the oral hearings, both sides filed extensive briefs with the arbitrators. On September 16, 1963, Samford filed its brief with the arbitrators, totalling 105 pages. Upon receiving the briefs of the opposing party, each party filed a reply brief, Samford's being filed on October 8, 1963, and Petitioner's on October 17, 1963, Mr. Romero also wrote letters to the Board on October 4 and November 13, 1963, concerning further aspects of the case. R. III, 116 (9).

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[7]These transcripts are on file with the Clerk of the Supreme Court as part of the record below.

On November 12, 1963, the arbitrators issued their unanimous, formal written award in favor of Samford by rejecting Petitioner's claim and allowing part of Samford's claim. A. 30-35. The award determined that Petitioner had wrongfully abandoned its work on the five projects without contractual right and, pursuant to the authority granted by the subcontracts, Samford properly terminated Petitioner as a subcontractor and completed its work. A. 34. Samford had claimed total costs of completion of Petitioner's work in the amount of $244,025.00, which sum included Samford's extended overhead and administrative costs. A. 72. Of the amount claimed, the arbitrators determined that the reasonable cost to Samford for completing this work was $158,307.86. A. 34. After subtracting the total unpaid subcontract balance of $142,435.51 from this $158,307.86 as provided in the default provisions of the subcontracts, the Board determined that Petitioner was indebted to Samford in the amount of $15,872.35, discharging Samford from any and all liability to Petitioner. A. 34.

It is most important that following the commencement of Civil Action No. 65-64, by Petitioner on February 7, 1964, challenging the arbitration award on the ground, among others, that the arbitration award should be vacated by reason of the alleged partiality of Mr. Capacete, Petitioner admitted and ratified the Board's capacity, competency and qualifications by expressly seeking relief from the Board itself by filing a petition on March 10, 1964, for review of the award. Samford filed two briefs responding to this petition on March 18, and August 1, 1964. The arbitrators took no further action in the matter following the award of November 12, 1963. R. III, 116 (11).

d. *The Challenges of the Award*

Following issuance of the award, Petitioner made a number of challenges of the validity of the award (A. 184), only one of which is before this Court, that being the allegation that certain previous business relations between Samford and Foundation Engineering Company of Puerto Rico constituted proof of "evident partiality" of one of the arbitrators, Mr. Capacete, under the Federal Arbitration Act, 9 U.S.C.A. §10 (b). Br. of Pet. at 3.

However, two of the other challenges are noteworthy. Petitioner sought to have the award set aside because hearings were held on two Sundays and on Labor Day, September 2, 1963 (A. 39, 52, 56), although the days hearings were held were decided upon by express consent and agreement of both parties and the arbitrators. (A. 67-68, 90). Secondly, Petitioner claimed that because the written award was rendered more than thirty days following the close of hearings, the award was void under Puerto Rican law (A. 39, 52, 56) although Mr. Romero, counsel for Petitioner, in the presence of the officer and owners of Petitioner's corporation, on the last day of hearings expressly agreed that the arbitrators would not be required to render this award within thirty days and stated that a waiver of the thirty day time limit made in open arbitration hearings was not required to be in writing in this case (A. 66-67, 94-95). Even though the arbitrators and all parties relied on this statement and these matters were agreed to at the time, and even though the reply brief of Petitioner to the arbitrators and two letters of Mr. Romero to the arbitrators were filed with the arbitrators after the thirty day period had allegedly expired (A. 95; R. III, 116 (9-10), Petitioner sought to use these arguments to set aside the award.

**Mr. Capacete**

As the prominent member of the Foundation Engineering Company, the sole such engineering consulting firm in Puerto Rico for many years and continuing as one of the two, and subsequently three, such firms in later years, as a lecturer and professor of engineering at the University of Puerto Rico, and as a member of a leading architectural firm, Mr. Capacete was probably the best known, most qualified, highly respected and the leading consulting engineer in Puerto Rico. A. 65-66, 142; R. III, 116 (5). Even the District Court in commenting to Mr. Romero, counsel for Petitioner, stated,

> "I know Mr. Capacete pretty well and I know his caliber as an engineer and as a man of science, there is no doubt." A. 80.

In choosing the third arbitrator, it was a natural decision for the engineer, Mr. Chapman, and the attorney, Mr. Holman, to select such an outstanding and recognized expert as Mr. Capacete. No allegation has been made, nor does the record in any way suggest, that Respondents attempted in any way to influence the selection of the third arbitrator.

Mr. Capacete was never the employee or agent of Samford. Mr. Capacete testified that he owned 67% of Foundation Engineering Company of Puerto Rico. A. 141. It was this corporation that, as an independent contractor, provided the unrelated and occasional testing services for Samford. Samford has always stated, when asked, that prior to the dispute between the parties and the arbitration proceedings, Foundation Engineering Company had, a year or more before the arbitration, performed certain routine testing services on isolated oc-

casions for Samford. A. 139. Samford was engaged in a major amount of construction in Puerto Rico, the five prime contracts of Samford involved in this dispute totaling over $9,000,000.00. A. 30-31, 41. Other construction was also being performed by A. C. Samford Overseas, Inc., a Georgia Corporation, in Puerto Rico and by A. C. Samford Virgin Islands, Inc., a separate and independent Virgin Islands Corporation, in the Virgin Islands. A. 136; R., I, 1 (4); III, 116 (3). To use Foundation Engineering Company for customary and routine construction testing and laboratory services pertaining to this construction was virtually a foregone conclusion. As Mr. Capacete testified, *"I would say I have business relations with most of the contractors in Puerto Rico."* A. 142.

The Petitioner's May 6, 1965 pleading attacking the award alleged:

> "During the years 1958 through 1962 he [Mr. Capacete] was employed by the defendant to render services for testing, for concrete steel and compaction, for the preparation of borings and other services in connection with the Oncologic Hospital, the Aguadilla Housing Project and the Power Plant for which he received fees from the defendant in the sums of $1,800.00, $2,500.00 and $3,000.00 respectively. In addition, he was also employed by the defendant in connection with a project at the Saint Croix Air-Sea Hospital [*sic*-Hotel] and the Saint Croix V.I. quarry investigation for which he received a fee of $12,000.00 from the defendant." A. 59.

Petitioner's attorney, Mr. Romero, at the July 16, 1965 hearing, in discussing this allegation, judicially admitted ". . . *we don't mean to say that we believe that*

*the chairman acted improperly in any way . . .*" (A. 75) (emphasis added), but contended that Samford had a business relationship on three projects involved in the arbitration ". . . which were the Hospital, the Medical Center, the soil tests and borings, he had received $1,800. In the Aguadilla Housing, another project, soil testing, etc., he had received $2,500. For the power plant and laundry building of the Medical Center, another project, he had received $3,000. . . . He had also done work in a St. Croix hotel for $12,000. *All this, it is true, had been prior to this claim . . .*" (A. 75-76) (emphasis added).

Thus, both the Petitioner's pleadings and opening statement clearly admit and stipulate the following:

(1) The nature of the services were soil tests, borings, and quarry investigations.

(2) Petitioner does not even allege or suggest that these services in any way related to painting or the Petitioner's work or disputes decided by the arbitration.

(3) The vast majority of such services and payments involved quarry investigation and soil testing and borings on projects that were not involved in the arbitration and not even located in Puerto Rico, but rather on the Island of St. Croix, Virgin Islands, in connection with the St. Croix Ait-Sea Hotel and the St. Croix, Virgin Islands, quarry for which an alleged fee of $12,000.00 was paid. A. 59, 76.

(4) The Petitioner expressly admitted that these unrelated business relations had occurred as long as five years before (1958) to a year (1962) before the arbitration (1963) and all business relations had been terminated before the arbitration, when Mr. Romero

stated: *"All this, it is true, had been prior to this claim. . . ."* A. 76. (Emphasis added.)

The evidence and the record, as hereinafter next discussed, amplify and correct these general allegations of Petitioner and conclusively establish that Mr. Capacete was fully qualified and competent to serve as an arbitrator and that all of his relationships with Samford had been remote, insubstantial, casual and had completely terminated a year or more before the arbitration.

Some of the services of Mr. Capacete's firm about which Petitioner has complained were performed not for Samford, but for architects prior to construction. Petitioner as a large painting contractor had full knowledge that Respondent bid on these public projects after the various owners' architects had designed them and that the work performed by Mr. Capacete's firm for these architects prior to construction was in no way a business relationship between Mr. Capacete's firm and Samford. Petitioner's allegations regarding services on "Oncologic Hospital, on the Aguadilla Housing Project and the Power Plant" and payments of "$1,800.00, $2,500.00 and $3,000.00 respectively" were unwarranted and incorrect. Mr. Capacete testified:

> ". . . In several of these jobs, like the Aguadilla Housing Project and the oncological hospital, I believe the power plant, *I did some work for the architects* which indirectly was on the project where Samford's work was being carried on, but also I did some testing work for Samford after construction started. *The work for the architects was prior to construction."* A. 136. (Emphasis added.)

The Respondent, A. C. Samford Overseas, Inc., over

a period of several years paid Mr. Capacete's firm, Foundation Engineering Company of Puerto Rico, a total of only some $2,000.00 to $4,000.00. The Virgin Islands work was a separate and unrelated operation. Indeed, A. C. Samford Virgin Islands, Inc. was a separate and independent corporation with its own general manager and operations in St. Croix, Virgin Islands. This Virgin Islands corporation was not a party or in any way involved in the arbitration. After excluding all fees paid Mr. Capacete's firm for Virgin Islands work, the record establishes that Mr. Capacete's firm during the several year period involved received fees of only some $2,000.00 to $4,000.00 from Respondent Samford. Mr. Capacete's testimony establishes this:

> "Q. Do you recall whether your company did any work in connection with these projects? A. Yes. We did in about two or three of those projects, we did some testing work.
>
> Q. Which had no relationship at all to the painting work? A. No.
>
> Q. Do you recall about how much money was involved in these services? A. In the order of three or four thousand dollars, *maybe two or three thousand dollars.* I don't recall the exact figure.
>
> Q. Was that work done for Samford or are you referring to work done prior to it? A. No, work done for A. C. Samford Company.
>
> Q. In these projects? A. Over a period of two years or so.
>
> Q. And all the work involved things different from the actual work of painting? A. Yes." A. 140. (Emphasis added.)

The record of the July 16, 1965 hearing further indi-

cates the minor and insubstantial nature of the work performed by Mr. Capacete's firm. Counsel for Respondents stated,

> "... we believe we can establish that Commonwealth Coatings knew or should have known that Mr. Capacete had previously done some *minor work*. ...
>
> The factual portions of the statement made by Commonwealth [*sic*] attorney are denied. One, we assert that *there were several corporations involved* and he [Commonwealth's attorney] knew it, working in the Virgin Islands, in their pleadings, not the one [Respondent, A. C. Samford Overseas, Inc.] involved in this litigation. Secondly, the Samford party tendered to this Court proof that Mr. Capacete received from 1958 through 1962 or 1963 in some four or five year period, when I say Mr. Capacete I am referring to *his firm* for testing concrete pourings—
>
> The Court: I know what the business of Mr. Capacete is and I believe that he is the most competent man in that business in Puerto Rico.
>
> Mr. Currie: *He received something less than two or three thousand dollars in routine business of his, or his business received it, when his business had an annual gross of a million dollars.*" A. 81-82. (Emphasis added.)

Although Mr. Capacete's testimony establishes that he was a professional civil engineer (A. 135), all of the services and fees involved in the Petitioner's allegations were rendered by and paid to the Foundation Engineering Company of Puerto Rico (A. 136). Mr. Capacete's work was not in his "own personal capacity," but for the Foundation Engineering Company (A. 136) which, as an independent contractor, had provided all the testing and

other services described in the Petitioner's allegations and the record. Indeed, most of these services and fees involved not the work of Mr. Capacete, but the employees of the Foundation Engineering Company. Mr. Capacete testified:

> "A. I own 67% of the Company.
>
> Q. That's what we wanted to clarify. You own 67% of the company? A. Yes.
>
> Q. When you mentioned this work done by your company for the Samford organization, was this work the actual work actually performed by you? A. No, it was performed by my personnel.
>
> Q. Your personnel; in other words, this work didn't in general require your direct intervention? A. Let's say 10% of my direct intervention.
>
> Q. Only 10%? A. Yes." A. 141.

Nothing in the record justifies attributing to Respondent, A. C. Samford Overseas, Inc., the services performed for and paid by another and independent corporation, A. C. Samford Virgin Islands, Inc. To the contrary the record establishes that Mr. Capacete and his firm recognized that there were two separate companies and operations, for Mr. Capacete's testimony expressly recognized them as two rather than one company and operation, namely:

> "During the years 1957 or 1958 to 1961 or 1962 I did some work for Samford Company of Puerto Rico and the Samford Company of the Virgin Islands." A. 136.

The Respondents' attorney at the July 16, 1965 hearing, without contradiction or denial from the Petitioner or its attorney stated:

"One, we assert that there were several corporations involved and he [Commonwealth's attorney] knew it, working in the Virgin Islands, in their pleadings, not the one [Respondent, A. C. Samford Overseas, Inc.] involved in this litigation." A. 81.

The magnitude and multiple aspects of Mr. Capacete's professional work clearly demonstrate the insignificance and insubstantial nature of the testing services for Samford. Not only did Mr. Capacete serve on the faculty of the School of Engineering of the University of Puerto Rico but he was a principal in two corporations involved in engineering and construction. In the July 16, 1965 hearing Respondents' attorney, Mr. Ramirez, described this to the District Court:

"Mr. Capacete has two corporations dealing with the trade of engineering. He is president of Sacmac, the largest structural firm doing a gross income of over a million dollars. Also, president of Foundation Engineering dealing with testing of materials and up to 1960 it is my understanding there were only two companies dealing with this and Mr. Capacete's was the largest company. . . . If Mr. Capacete could not serve contractors who have at one time done business with his corporation, he couldn't act as an arbitrator. . . . Many contractors call the offices of Foundation Engineering to have a job done in terms of testing. . . ." R. V, 138 (17-18).

The testimony of Mr. Capacete further described the business of these companies. He stated that the Foundation Engineering Company had had an annual income during "those years" in question "in the order of $200,000.00" per year. A. 141. This company until 1957 was the only one providing such engineering and testing services in Puerto Rico, "Then until 1959 there were two. After 1959 there were three." A. 142. Foundation

Engineering was the biggest such firm until 1959 or 1960 since which time it has remained as large as any of the others. A. 142.

Mr. Capacete also testified he was an owner and officer in another company involved in the engineering-architectural field. The name of this firm is Capacete, Martin, & Gutierrez, but it is called "SACMAG." A. 142.

Thus it is obvious that Mr. Capacete was correct when he testified: *"I would say I have business relations with most of the contractors in Puerto Rico."* A. 142. (Emphasis added.)

The $200,000.00 per year annual income of the Foundation Engineering Company (A. 141) multiplied by the six year period involved, 1957 through 1962 equals $1,200,000.00. The total of $2,000 to $4,000 (A. 140) paid by Respondent Samford during this period to Mr. Capacete's firm thus equals less than 1/3 of 1% of the income of this firm.

Even if there are included the fees and work performed by Mr. Capacete's firm for A. C. Samford Virgin Islands, Inc. the grand total of all fees paid by all Samford's companies to Mr. Capacete's firm during this six year period was only ". . . in the order of $12,000.00." A. 139. Thus, the evidence and record reveal that even if there are included payments made by another independent corporation for the St. Croix, Virgin Islands, work, still Samford provided no more than 1% of the total business of Mr. Capacete's firm.

Again, even including work performed by Mr. Capacete's firm for the owners' architects for testing prior to construction and before Samford bid the jobs, there is at

most a grand total for all services rendered to all of Samford's companies and the unrelated architects of only the amounts alleged in Petitioner's May 6, 1965 pleadings (A. 59) namely: $1,800.00, $2,500.00 and $3,000.00 for Puerto Rico testing and $12,000.00 for St. Croix, Virgin Islands testing there is a total of only $19,300.00 during the six year period or only 1.6% of Mr. Capacete's firm's income. However, there is no justification for including and imputing to Respondent Samford fees not paid by Respondent Samford but by independent architects engaged by the owners of these projects and fees paid to the independent Samford corporation of the Virgin Islands.

When the $1,000,000.00 per year gross income of SACMAG is added to the other income of Mr. Capacete's business interests the above percentages are radically reduced and the insubstantial nature of the testing fees *paid Mr. Capacete's firm becomes obvious. For example,* multiply the SACMAG $1,000,000.00 income, not for six years, but only three years and there is an additional $3,000,000.00 in gross income to be added to the $1,200,000.00 gross income of the Foundation Company to produce a total of $4,200,000.00 in gross income for firms in which Mr. Capacete was interested as president and principal owner.

The total of $2,000 to $4,000 (A. 140) paid by Respondent Samford would thus equal less than 1/10 of 1% of this gross income of $4,200,000.00. The total of $12,000 for all Samford's companies' testing in both the Virgin Islands and Puerto Rico would equal less than 3/10 of 1%. Even the unjustified, incorrect, and exaggerated $19,300 total of the Petitioner (A. 59) equals less than

1/2 of 1%. The insignificant and insubstantial nature of the amount is self-attesting.

The uncontradicted testimony conclusively establishes that these testing services in no way involved painting or the issues and disputes in the arbitration. A. 136, 140. All of the services were rendered by Foundation Engineering Company and the company was paid for those services, not Mr. Capacete. A. 138. The fees paid Foundation Engineering Company were the normal and customary fees for such services. A. 65.

It is obvious that "drilling for foundation investigations" and "testing construction materials such as sand, gravel and concrete blocks and compaction of the soil" (A. 139) involved testing services related to site preparation prior to construction and the work on foundations, the first phase of construction, while it is equally obvious that painting is among the last of the construction activities since the walls, ceilings and doors must be installed and completed before they receive the paint and it is natural to delay the painting until the end to prevent scratching or damage. Since all five of the prime contracts involved in the arbitration were executed in 1959 and 1960 it is apparent that the testing work performed by Mr. Capacete's firm, because of its nature, was performed during the early portions of the work in 1959 and 1960. Petitioner's painting subcontracts were executed in 1960 and 1961. (A. 41) and the painting was still being performed on all of them at the time Petitioner wrongfully abandoned the work in June and July, 1962. This further establishes painting to be among the last phases of work to be performed on a construction project. Thus, both by nature of the work, as well as the time of performance, Mr. Capacete's services did not in any way re-

late to the painting and issues of the arbitration. Indeed, Petitioner's own attorney admitted to the court that all of the services, both in the Virgin Islands and Puerto Rico, performed by Mr. Capacete's firm, "had been prior to this claim" (A. 76) involved in the arbitration.

Thus, it is certain there was no relationship between the testing services of Mr. Capacete and the dispute and the arbitration. Also the record reveals that Mr. Capacete and his firm never performed any services for Samford or others on the Wherry Housing Modification and improvement contract at Ramey Air Force base which involved a painting subcontract with Petitioner for $230,750.00 (A. 41, 71) which was approximately 70% of the total dollar amount of all painting subcontracts involved in the arbitration. It is equally obvious that Mr. Capacete was never the agent or employee of any of the Samford companies but that his firm, as an independent contractor, more than a year before the arbitration, had provided occasional, remote, unrelated, isolated, insignificant and insubstantial routine testing services for which the Foundation Engineering Company was paid the customary fees, and even this testing work was performed by the employees of this company with only the minor and slight supervision of Mr. Capacete.

All of these facts explain the reasonableness of Mr. Capacete's answer to Mr. Romero.

> "Q. Did you have any reason to believe that this matter should be disclosed? A. No." A. 137.

No consulting or testing services were furnished by Mr. Capacete or any of his firms during the arbitration hearings, and in fact the last such services had been concluded at least a year or more before the arbitration. A.

139. Also, there was little or no likelihood of the need for further services since Samford had not contracted for major projects in Puerto Rico for some two or three years before the arbitration and was arranging to close its operations in Puerto Rico upon completion of its existing contracts. R. III, 116 (6).

The difference in the relationship of Mr. Capacete with Samford and with counsel for Petitioner is considerable and significant. Mr. Capacete testified that he had met A. C. Samford, Jr., the President of A. C. Samford Overseas, Inc., only, "about 4 or 5 times." A. 135. On the other hand, Mr. Capacete testified that at the time of the arbitration hearings he knew Mr. Romero, counsel for Petitioner, "very well"; that he was "a very old friend of his [Mr. Romero's] father," who was one of the "highest esteemed engineers on this island"; and that Mr. Romero and he were fellow members of the Rotary Club. A. 146. He summarized his relationship with Mr. Romero as, "I know him well, I would say, as a good friend of mine." A. 146. Mr. Capacete further testified that Mr. Romero was acquainted with his position in the field of engineering and with his activities, and that "he was acquainted that he knew my type of business, that I was a consulting engineer in foundations and in testing." A. 146.

### The "Investigation" by Mr. Romero

The long history of this litigation, the undisputed testimony given at the trial, the record and all of the briefs[8] and other pleadings of the parties filed in these

[8]Petitioner for the first time in the litigation argued in its Reply Brief in support of the granting of certiorari that it made inquiry of Respondents and/or Mr. Capacete.

actions clearly show, definitely and without question, that Petitioner never made inquiry of Mr. Capacete or any of the Respondents or their counsel prior to the issuance of the award concerning whether there had ever been business relations, directly or indirectly, between Mr. Capacete and any of Respondents, including Samford. See, *infra* at 42-62. In short, Petitioner *never asked* any of the interested parties about such business relations or any other aspect of Mr. Capacete's qualifications or relationships. The only proof at the trial was that, although the above-described close relationship and friendship existed between Mr. Romero and Mr. Capacete, Mr. Capacete testified Mr. Romero never asked him whether he had performed work for or had had commercial relations with any of the parties to the arbitration (A. 146), even though Mr. Romero had consulted with Mr. Capacete about whom to select as a replacement for Mr. Holman (A. 145).

It is equally clear and certain that neither Mr. Capacete nor Respondents or their attorneys ever made representations of any sort that such business relations as did exist, though they were remote, casual and insubstantial, had not in fact occurred. Although Petitioner misleadingly and prejudicially argues that such information was "concealed," there is no evidence whatsoever — not even a scintilla — even suggesting such a serious charge, much less is there any *proof* of any "concealment." There is likewise no suggestion or evidence of any misrepresentation. Whatever Mr. Romero's "investigation" was, it did not include asking the simple question of Mr. Capacete or of Respondents or of their counsel. See, *infra* at 42-62. Even though Mr. Romero showed no hesitancy to testify in an effort to set the arbitration award aside, he at no

point even so much as suggests he made any inquiry of Mr. Capacete, Respondents, or of their counsel about Mr. Capacete or the other arbitrators. A. 148-153.

**The Ultimate Issue at the Trial**

The final hearing reflects a highly significant aspect about the challenges of the award by Petitioner. The issue at the trial as stated by Petitioner's attorney, Mr. Romero, and relied upon by the court and Samford, was not the alleged "partiality" of Mr. Capacete, but whether certain documents admitted into evidence in the arbitration proceedings were objected to by counsel for Petitioner. A. 147-183. Mr. Romero testified he objected (A. 149-150), but all three arbitrators testified otherwise (A. 119-120, 138, 159). To resolve this issue, the agreement was made, at the court's request, that each party would have those portions of the tapes of the hearings transcribed which it desired transcribed and submitted to the court, the costs of which were incidentally to be borne by Respondents. A. 174, 181-183.

In further rebuttal of Mr. Romero's testimony, Samford produced the court reporter and the tapes of the pertinent sessions. A. 163-178. When thus confronted, Mr. Romero himself twice called it "a matter of credibility" as to whether he had made the objections he testified to and stated Petitioner had "put forth a case that rests right now on credibiliy." A. 178.

The District Court several times indicated that if Mr. Romero's testimony was true that an objection was made, the court, or the parties by agreement, could resubmit the matter to the arbitrators providing an opportunity to Petitioner for rebuttal. A. 174-179. Mr. Ro-

mero's response to the suggestion of a resubmittal was only that he believed the arbitrators had expressed they "would feel very bad" about considering the case any further (A. 174), not that he had an objection to this same board hearing the matter again or that he challenged Mr. Capacete as being "partial" and therefore unqualified to hear the matter.

The transcript[9] was prepared and submitted to the District Court with briefs from both parties.[10] A. 27. The District Court found that no objection had been made by Petitioner, nor had Petitioner made any request for an extension of time to examine the documents or obtain additional testimony. A. 185.

It was therefore with some degree of surprise that, after such reliance and stress by Petitioner on the issue of admissibility of certain evidence virtually to the exclusion of other issues at trial, Respondents learned that Petitioner's appeal was based on the alleged "partiality" of Mr. Capacete. Obviously Petitioner's attorney realized it had no case unless it could establish abuse of fair play or procedural due process, and relied on his own testimony to make the whole case an issue of credibility. But the three arbitrators, including Petitioner's own arbitrator, a lawyer and a friend of Petitioner's attorney, testified there had been fair and lawful proceedings — and the court reporter's tapes and transcripts later confirmed that Petitioner's attorney's testimony before the District Court given in an attempt to overturn the award,

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[9]R. VI, 139.

[10]R. XVI, 159 (Br. of Samford); R. XVI, 160 (Br. of Petitioner). Copies of these briefs and all other briefs filed in the District Court have been certified by the Clerk of the District Court and filed with the Clerk of the Supreme Court.

was not correct, but contrary to the facts. This serious discrediting and the loss of Petitioner's attorney's own stated proposition to the District Court – "it's a matter of credibility" (A. 178) –is most relevant in evaluating the vague, indefinite and puzzling affidavit made and filed earlier by Petitioner's same attorney for the same purpose – to use in an attempt to overturn the award.

## ARGUMENT

### 1. Summary of Argument

Petitioner attacks the arbitration award rendered in the arbitration proceedings by the unanimous decision of the board of three arbitrators resolving all disputes of law and fact between Petitioner and Respondent Samford on the ground that the Chairman of the Board of Arbitration, Mr. Jose L. Capacete, was allegedly guilty of "evident partiality" within the meaning of §10 (b) of the Federal Arbitration Act, 9 U.S.C.A. §§1-14, for the reason that there had been certain past business relationships between the firm with which Mr. Capacete was associated, Foundation Engineering Company of Puerto Rico, Inc. and Respondent Samford prior to the arbitration proceedings. This challenge of the award is entirely unfounded and without merit, and the award should be confirmed for the following reasons:

(1) The business relationships between Foundation Engineering Company and Respondent Samford were remote, casual, insignificant, and isolated and had been concluded and terminated a year or more before the arbitration proceedings. The work performed consisted of professional engineering consulting testing services for Samford as a major contractor in Puerto Rico, and did not in any way pertain to Petitioner or the painting work of Petitioner. The amount paid Foundation Engineering Company by Respondent Samford was totally insignificant and nominal in amount, and was the normal and customary professional fee for such services. Foundation Engineering Company was only a part of Mr. Capacete's business interests as a professional engi-

neer, and Mr. Capacete personally had little to do with the services performed.

(2) Petitioner admits that there was no actual partiality or bias on the part of Mr. Capacete and that Mr. Capacete did not act improperly in any respect, and Petitioner thereby admits that there was no actual effect on the award by reason of such past business relationships.

(3) The arbitration proceedings were, in fact, fair and impartial and were expressly so found to be by the District Court and the Court of Appeals.

(4) Although Petitioner incorrectly argues that there was "concealment" and on occasion has intimated that some "investigation" was made by Petitioner's counsel, there is absolutely no shred of evidence or implication in the record or elsewhere that any misrepresentation was ever made by Mr. Capacete, Respondents or their counsel or that these persons acted in any fashion other than in total good faith with Petitioner and Petitioner's counsel. These conclusions are reflected in and are supported by the testimony and the evidence, the pleadings of the parties, the admissions of counsel for Petitioner in argument before the District Court, the failure of Petitioner to plead and prove facts relevant to such contentions, and the absence of any such statements or implications in the affidavit of counsel for Petitioner so heavily relied upon by Petitioner.

(5) The federal and state case authorities pertaining to validity of arbitration awards reflect the strong and pervading policy in favor of the finality of awards and stress that arbitration is in informal, contractual remedy which should remain unfettered by the technical re-

quirements and rules pertaining to litigation and which often cause litigation to be a less satisfactory remedy.

(6) The great weight of authority is to the effect that arbitration awards are to be upheld and confirmed unless there is present actual partiality of an arbitrator or such substantial, close, and important relationships exist between a party and an arbitrator that actual partiality is presumed to be present and to have had an effect on the hearings and the award; it is admitted by Petitioner that Mr. Capacete was not actually partial, and the facts reflect that no significant close, and important business relationship existed.

(7) Although Petitioner argues to the contrary, the authorities reveal that there is no duty on the part of an arbitrator or a party to volunteer information about previous business relationships unless there is an express contractual duty to do so or, by reference, rules have been incorporated to that effect such as the rules of the American Arbitration Association; there is no such contractual duty or incorporation of arbitration rules in the case at bar.

(8) The case authorities reveal that it is incumbent upon an objecting party to make reasonable and prudent inquiry if the party is to be entitled to raise objections as to business relationships, and no such inquiry was ever made by Petitioner of Mr. Capacete, Respondents or their counsel.

(9) The legislative history of the Federal Arbitration Act reveals that the purposes of the Act were to make arbitration enforceable as a matter of contract and to avoid thereby the delays, the technicalities and the expense of prolonged litigation and to arrive at re-

sults more suitable to the business world than was often found in judicial determination of business and commercial disputes, and that to enforce such a policy, including avoidance of delays by use of the appeals process, awards should be confirmed unless there is found to be an "inherently vicious" departure from what is moral.

(10) Even if it is determined that the previous business relations which occurred between Foundation Engineering Company and Respondent Samford could have have possibly been disqualifying relationships, Petitioner waived any right to object to such relationships because it either had actual knowledge or constructive knowledge of such relationship by knowledge of the business and reputation of Mr. Capacete in Puerto Rico, the substantial nature of the construction work being performed by Samford in the small area of Puerto Rico, and the related nature of the respective businesses, especially in view of the fact that Petitioner's counsel and Mr. Capacete were close personal friends, continually in communication prior to and during the arbitration proceedings.

(11) Public policy demands that the award be confirmed to strengthen arbitration as a practical contractual remedy without procedural pitfalls as would be created if any other disposition of the case is made.

(12) The rules of disqualification of judges and jurors reveal that such persons would not be disqualified under the facts of this case, and moreover, always with regard to jurors and often with regard to judges, it is incumbent upon the objecting party to make relevant inquiry to learn of such facts or otherwise the objection shall be considered waived.

(13) To vacate the award, either on the ground that past, remote and unrelated business relations will per se invalidate an award or upon a review of the facts it is found, as a matter of law, that evident partiality was present, would destroy confidence in arbitration as a remedy and end the usefulness of arbitration as a viable means of resolution of disputes, encouraging losing parties to seek to find such past and unrelated relationships after awards have been rendered, rather than to make reasonable inquiry prior to such proceedings, and to seek to overturn the proceedings on the basis of any relationship of whatever significance found to exist, and thus thereby merely add another step, of useless value, to the litigation process rather than avoid litigation.

**2. Petitioner has failed to show "Evident Partiality" of Mr. Capacete under the Federal Arbitration Act.**

Petitioner has based its appeal on the argument that there was "evident partiality" on the part of Mr. Capacete under the Federal Arbitration Act, 9 U.S.C.A. §10 (b). The District Court and the Court of Appeals held there had been no showing of "evident partiality" by Petitioner. A. 184-187, 192-195. Respondents respectfully submit that these holdings of the District Court and Court of Appeals are manifestly correct.

Although Petitioner has not raised the argument in its brief that the Arbitration Act of Puerto Rico, 32 L.P.R.A. §3222 (b), may apply as it did in its brief to the Court of Appeals[11] (at p. 12-13), the corresponding term under the Puerto Rican statute, "evident bias," does not appear to be a materially different standard.

a. *Petitioner's argument that there is an absolute duty to volunteer unsolicited information concerning previous relationships between an arbitrator and a party is without factual or legal foundation.*

(1) *Petitioner admits that Mr. Capacete was not actually partial or biased in any respect.*

Petitioner does not allege and has not attempted to show that Mr. Capacete was actually biased or partial or that the award was fraudulent in any respect. On the contrary, Petitioner has on numerous occasions admitted

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[11]Copies of this brief and all other briefs filed in the Court of Appeals have been certified by the Clerk of the Court of Appeals and filed with the Clerk of the Supreme Court.

that it does not challenge the honesty or integrity of Mr. Capacete or claim that Mr. Capacete acted improperly in any way.

In the first hearing before the District Court on the challenges to the award, held June 25, 1965, Mr. Romero, Puerto Rican counsel for Petitioner, stated,

> ". . . this isn't an allegation of fraud against the arbitrators. . . ."R. IV, 137 (2).

Mr. Korngold, New York counsel for Petitioner, then added unequivocally,

> "I would like the record clear that at no time is Mr. Romero or myself accusing any of the arbitrators with doing anything fraudulent." R. IV, 137 (2).

At the second hearing before the District Court on July 16, 1965, on the motions of Petitioner to set aside the arbitration award, Mr. Romero, attorney for Petitioner, stated,

> "Now, we don't mean to say that we believe that the chairman acted improperly in any way. . . ." A. 75.

The District Court summarized the position of Petitioner by stating,

> "I know Mr. Capacete pretty well and I know his caliber as an engineer and as a man of science, there is no doubt. And I believe that nobody here is trying to raise any reflection whatsoever on the ability, honesty and integrity of Mr. Capacete . . ." (A. 80),

to which Mr. Romero for Petitioner responded,

> "That's our position and we have so stated numerous times" (A. 81).

At the third hearing before the District Court on

February 14, 1966, on the motions of Petitioner to set aside the award, Mr. Romero for Petitioner admitted that it was making no challenge of the integrity of Mr. Capacete and, in fact, the Court was assured of Mr. Capacete's honor,

> "We want to make it known that we are in no way attacking the arbitrator's integrity. We believe him to be an honorable man" (A. 88).

to which the Court responded,

> "I believe you have said that all the time that you have come in here" (A. 88).

Mr. Romero, on direct examination by his associate counsel representing Petitioner, in answer to the question whether he would have objected had he known of the previous business relationship between Samford and Foundation Engineering Company, answered in part,

> "I don't think I would have objected because I know Mr. Capacete. . . ." A. 151.

**The District Court and the Court of Appeals Found the Arbitration Fair and Impartial**

On the basis of these admissions and upon consideration of all the evidence presented at the hearings and the arguments of the parties, the District Court held,

> ". . . *counsel for plaintiff disclaimed any imputation of bias, partiality, or fraud on the part of the arbitrator involved.* He seeks to overthrow the award on the ground that Samford should have informed plaintiff that the engineering firm with which the arbitrator involved was connected had in the past done work for Samford. In view of the fact that, not only has plaintiff failed to offer any evidence showing 'evident partiality' in said arbitrator (9 U.S.C. §10 (b)), *it also has expressly disclaimed any*

> *such imputation,* this objection to the award must be, and is hereby overruled. [Authority cited]." A. 185. (Emphasis added.)

After hearing all three arbitrators testify, after examining evidence admitted in the arbitration and listening to and reading portions of the testimony and proceedings tape recorded at the arbitration, the District Court found the hearings to be fair and commented on the arguments presented by Petitioner,

> "In closing, I wish to state that the record shows that *the arbitrators conducted fair, impartial hearings;* that they reached a *proper determination of the issues before them,* and that plaintiff's objections represent a 'situation where the losing party to an arbitration is now clutching at straws in an attempt to avoid the results of the arbitration to which it became a party.' [Authority cited]." A. 185-186. (Emphasis added.)

The Court of Appeals held that "the [District] Court was well warranted in finding that there was no prejudice or bias manifested in the course of the proceedings. Indeed, there was considerable evidence which negatived it." 382 F.2d 1010, 1012; A. 194.

On certiorari Petitioner has apparently not altered its original position of not challenging the integrity of Mr. Capacete. In its Reply Brief to this Court for the first time Petitioner did attempt to argue that it made inquiry of *someone* among Mr. Capacete and Respondents, (Reply Br. of Pet., p. 1-2), but this argument has not been presented in Petitioner's brief on the merits, and in light of all the admissions by Petitioner as to the integrity of Mr. Capacete, it can only be concluded that Petitioner does not intend at this point to reverse its original position as to the actual integrity and lack of any actual partiality on the part of Mr. Capacete.

In summary, it can be said on the basis of the admissions by Petitioner of Mr. Capacete's integrity that Petitioner is not suggesting that Mr. Capacete had any wrongful motive of any sort, conscious or subconscious, or that Mr. Capacete had any effect on the outcome of the arbitration proceedings which would not have occurred had the previous business relationships complained of not existed. Petitioner, consequently, is not arguing that the decision of the arbitrators has in any way been affected by the previous business relationship between Samford and Foundation Engineering Company.

(2) *Petitioner's attempt to impute bad faith to Mr. Capacete or Respondents or to show that inquiry was made is completely without foundation and is entirely refuted by the facts of the case.*

It is difficult for Respondents to ascertain definitely just what Petitioner's position is now with respect to the allegation made in the Reply Brief to this Court that Petitioner made inquiry of Respondents or their counsel, if not Mr. Capacete, concerning previous business relationships, because this argument, which one would assume to be important if there were any basis in fact, is not apparently presented in the brief of Petitioner on the merits. However, apparently Petitioner is at least attempting to impute some degree of bad faith to Respondents, and perhaps Mr. Capacete, if not actually alleging that some misrepresentation was made as to previous business relations upon inquiry by Petitioner, by continuing to argue that such relations were "concealed" from Petitioner. Br. of Pet., p. 13, 15. If this is intended to imply some act was done with a view toward preventing Petitioner from learning of such past and remote relations, it is misleading, incorrect, and an unwarranted, prejudicial description of Petitioner's

own failure to inquire of Mr. Capacete, Respondents or their counsel about Mr. Capacete or any of the arbitrators. Neither actual misrepresentation nor any degree of bad faith on the part of either Mr. Capacete or Respondents or their attorneys is present anywhere in the case, and the clear and undisputed evidence shows that no such inquiry was made by Petitioner; equally important, the clear and undisputed record proves Mr. Capacete and Respondents and their attorneys at all times conducted themselves truthfully, fairly, and properly toward Petitioner; these facts are established conclusively, as follows:

**The Testimony and the Evidence**

No testimony or other evidence in the record reflects any claim of or the existence of any inquiry of Mr. Capacete or Respondents or their counsel, by Petitioner. A. 99-163. It is of great significance that although Mr. Romero, attorney for Petitioner, testified at the trial, he furnished no testimony even inferring or suggesting that he made any inquiry of Mr. Capacete, Respondents or their counsel concerning previous business relationships or otherwise. A. 148-153. To the contrary, the undisputed and only proof at the trial, by Mr. Capacete's own testimony, was that he was never asked by Mr. Romero whether he had ever had business relations with any of the parties to the arbitration. A. 146. Even though Mr. Romero examined Mr. Capacete at the trial, Mr. Romero did not seek to discredit, dispute, explain or overcome this testimony. A. 135-146. Petitioner simply furnished no proof at the trial to attempt to show there was ever any inquiry by Petitioner, prior to the arbitration, of Mr. Capacete, Respondents or their counsel as to the qualifications of Mr. Capacete or as to previous relation-

ships between Mr. Capacete and any of Respondents, a telling failure on Petitioner's part which can only reflect that no such inquiry was ever made.

It is certain that if such inquiry had been made, Petitioner's own witness and attorney who allegedly made the inquiry would have testified in detail regarding such inquiry.

### The Petition and Motion of Petitioner in Civil Action 65-64

The pleadings of Petitioner constituting a part of the record in the District Court which were filed in challenge of the arbitration award do not contain any allegation or claim that inquiry was made. A. 36-61. The only allegations as to Mr. Capacete and previous business relations are found in the petition in Civil Action 65-64, filed February 7, 1964, and a subsequent motion and petition filed in that action on June 15, 1965, all of which are to the effect there was no "disclosure" of such relationship, but there is no allegation that any personal inquiry was ever made or that anything more occurred than that this information which had not been requested by Petitioner had not been volunteered by Mr. Capacete or Respondents or their counsel (A. 48, 55, 59), who did not know what Petitioner and Petitioner's counsel did or did not know. More importantly, under the facts of this case it would be unusual for Respondents not to have assumed Petitioner knew all it desired and certainly, if more was desired, Petitioner would make inquiry.

## The Memorandum of Law of Petitioner filed in Civil Actions 441-62 & 442-62

The Memorandum of Law filed by Petitioner in the District Court in Civil Actions 441-62 and 442-62 on July 16, 1965, which is the only brief filed by Petitioner in the District Court on the issue of partiality clearly reveals that Petitioner did not allege that personal inquiry had been made of Mr. Capacete, Respondents or their counsel but that Petitioner was arguing that such information should have been *volunteered,* although this and other information was not solicited by Petitioner. R. XVI, 156.

In discussing the affidavit of Mr. Romero filed in Civil Action 65-64 on February 7, 1964, the only interpretation made by Petitioner is that the affidavit denies knowledge of any previous business relations; no interpretation, inference, or suggestion is advanced by Petitioner, that the affidavit shows Petitioner made inquiry of Mr. Capacete, Respondents or their counsel. R. XVI, 156 (11a).

In discussing the commercial arbitration rules of the American Arbitration Association in the Memorandum, Petitioner made the argument that the rules require a prospective arbitrator to volunteer information concerning any relationship with either of the parties or their counsel even though not asked by a party to do so. R. XVI, 156 (9). Stressing this argument shows Petitioner's position to be that there is a duty to voluntarily disclose relaionships *even absent inquiry about such or any other relationships* by the other party and although the rules of the American Arbitration Association do not apply in the case at bar.

Petitioner in its Memorandum to the District Court summarized its argument by saying that an arbitrator must conform to the "standard of Caesar's wife" (R. XVI, 156 (4)), that he not only must be actually free of any bias, but also "appear" to be free (R. XVI, 156 (11a)), and that Petitioner had a "right to know" of business relationships (*Ibid.*). No claim of inquiry or misrepresentation was ever made by Petitioner in its only written argument to the District Court on this issue.

**Brief of Respondents to District Court on "partiality"—response by Petitioner**

Respondents in their Brief to the District Court on certain challenges to the arbitration award filed in these actions on April 5, 1966, made the point, among others, with reference specifically to the allegation of partiality, that information concerning business relationships with Mr. Capacete had never been sought by Petitioner from Respondents prior to the arbitration proceedings. R. XVI, 159 (18-33) The brief specifically states:

> "Commonwealth [Petitioner] argues that Samford was required to "volunteer" all the information it knew of concerning business relationship with the arbitrators to Commonwealth Coatings, *even though such information was never solicited by Commonwealth.* . . . The duty is one of inquiry, not one of volunteering any and all information. *No one at any time withheld any information from Commonwealth.* . . ." R. XVI, 159 (24). (Emphasis added.)

Most significantly, no issue was taken by Petitioner in the District Court or the Court of Appeals to this statement of the true facts and the assumption by Re-

spondents that Petitioner was not making any allegation that it had made inquiry of Mr. Capacete, Respondents or their counsel prior to the arbitration proceedings.

### Oral Argument of Counsel for Petitioner to District Court

The numerous instances in oral argument before the District Court where counsel for Petitioner admitted the honesty and integrity of Mr. Capacete and indicated that no allegation of actual partiality, bias or fraud was being made have already been discussed. *Supra*, at 38-40. In discussion of the issue of disclosure of relationships, no charge was made that Petitioner conducted a personal inquiry or was misled by Mr. Capacete or Respondents or their counsel. A. 74-80. Instead, the general argument was again made by Petitioner that the award should be vacated because of the mere existence of past and remote business relations in accordance with the proposed standard of "Caesar's wife" (A. 75), not because of any wrongdoing by Mr. Capacete or Respondents or their counsel.

### Questions Presented as Expressed by Petitioner

The questions as expressly and thoughtfully argued and stated by Petitioner in its Statement of Points to the Court of Appeals (A. 190-191), in its Brief to the Court of Appeals at (p. 1) and in the Petition for Certiorari (at p. 2) do not suggest or allege expressly or impliedly any such contention that inquiry was made. Petitioner's only reference is to an alleged "failure to disclose" and that such alleged "failure" constituted "concealment." Again, there is no allegation that Mr. Capacete or Respondents or their counsel were ever asked about any

previous relationships or qualifications of the arbitrators or that any misrepresentations were ever made by them.

**Questions Presented as Expressed by Respondents and Response of Petitioner.**

The questions as stated by Respondents in their Brief to the Court of Appeals do not, expressly or impliedly, suggest that such inquiry was the issue but demonstrate such was not an issue. In their Brief to the Court of Appeals, in presenting the question concerning whether Petitioner waived its right to object to Mr. Capacete, Respondents asked in part,

> ". . . where counsel for the complaining party was a close personal friend of the arbitrator with ample opportunities to inquire of previous business relations, did the complaining party not waive its right to object to the arbitrator in question *by failing to inquire of the arbitrator or the other party concerning previous business relations* and remaining silent during the course of the arbitration proceedings until learning that the award was adverse?"[12] (Emphasis added.)

As implied by the question, it was understood by Respondent to be an undisputed truth and fact that no such inquiry had ever been made by Petitioner. Petitioner's Reply Brief to the Court of Appeals contained no objection to this understanding and no argument was advanced that inquiry had been made.

In the Response to the Petition for Certiorari, Re-

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[12]Brief of Respondents to the Court of Appeals, p. 1-2.

spondents again stated as a consideration involved in the question presented,

> ". . . No inquiry was made [by Petitioner] of the party or the arbitrator about business relations. . . ." Brief of Respondents, p. 1.

It is at this point that Petitioner first belatedly and incorrectly took issue with Respondents. Reply Brief of Petitioner, p. 1-2. This unwarranted allegation was answered in Respondents' Petition for Rehearing.

**Briefs of the Parties**

In the briefs of the parties in the Court of Appeals and in the Supreme Court, prior to the Reply Brief of Petitioner in the Supreme Court, there was no dispute or issue taken concerning the true fact and historical understanding that Petitioner had made no inquiry of Mr. Capacete, Respondents or their counsel. Respondents, in presenting their arguments to the Court of Appeals, stressed the same points of fact in their brief as they made in their brief in opposition to the Petition for Certiorari, to the effect that there was no inquiry made by Petitioner of Mr. Capacete or the Respondents and that Mr. Capacete specifically testified without contradiction by anyone, that he had not been asked about any previous business relationships with any of the parties.[13] Petitioner in its brief to the Court of Appeals and in its Reply Brief to the Court of Appeals did not take issue with these true statements.

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[13]Brief of Respondents to the Court of Appeals, 17-18, 31-32; Brief of Respondents in Opposition to Petition for Certiorari, 9, 18.

**Petitioner's Lack of Facts**

There has been no allegation, until the Reply Brief of Petitioner in the Supreme Court, that any information on any subject supplied by Respondents or their attorneys by Petitioner, to the arbitrators or to any court in the course of the arbitration and litigation was not totally faithful to the facts and completely truthful. In the Reply Brief Petitioner apparently attempted to argue that either Mr. Capacete or Respondents or their counsel made basic misrepresentations of fact to Mr. Romero concerning previous business relationships; a most serious and totally unwarranted allegation. Reply Br. of Pet., p. 1-2. Petitioner continues to attempt to cast suspicion on Mr. Capacete and Respondents and their counsel by alleging "concealment" (Br. of Pet., p. 13, 15) an allegation implying much more than merely not volunteering information to Petitioner which Petitioner did not in any way ask for and which Respondent knew Petitioner either knew or could easily find out if Petitioner desired to know. Very definitely nothing cited or quoted by Petitioner supports or justifies such an attack. Surely if Petitioner had actually made such inquiry as it now alleges and the business relationship had been denied, or if there were some substance to the allegations of "concealment," as compared to not tendering unrequested information (which Petitioner knew or could easily have known by inquiry), Petitioner would have continually repeated and emphasized such points throughout the litigation with the utmost clarity and specificity, to say the least. The absence of any such argument speaks clearly and conclusively for itself. Petitioner did not ask Mr. Capacete or Respondents or their counsel and there were no misrepresentations by any of them.

**Mr. Romero's Affidavit**

Petitioner in its Reply Brief quoted the self-serving, general, vague, and indefinite affidavit of Mr. Romero as its sole reference to support the new allegation that inquiry had been made of Mr. Capacete or of Respondents or their counsel. Reply Br. of Pet., p. 2. Petitioner again quotes the affidavit in its brief on the merits, presumably to show "concealment." Br. of Pet., p. 7-8. A mere reading of the affidavit reveals it does not substantiate the charges made. Mr. Romero only stated in his affidavit that he "investigated" the arbitrators; Mr. Romero studiously and clearly avoided making any statement in his affidavit, or elsewhere:

1. That he had personally asked Mr. Capacete, any of the other arbitrators, or the Respondents or their counsel whether there had been previous relationships of any sort between any of the arbitrators and any of Respondents;
2. That any of these persons had "concealed" such information, or prevented or obstructed the "investigation," or that he had been misled in any way by any of these persons; or
3. That he or any of his associate attorneys or any one on behalf of Petitioner had ever asked Mr. Capacete or any of the arbitrators, or the Respondents or their counsel anything about the qualifications or competency of Mr. Capacete or any of the other arbitrators.

Most important, it is strange that the affidavit totally fails to describe and specify of what the alleged investigation consisted. Neither on its face nor by implication does the affidavit support the proposition that inquiry was made of any of these persons by Mr. Romero and never before has this attempted interpretation of the affidavit

been even suggested by Petitioner. Nor does the affidavit say or imply anything from which one could draw an implication of "concealment" or even bad faith of any degree. The affidavit simply says nothing at all about Mr. Capacete or Respondents that is material or relevant to deciding this appeal.

Significantly, the affidavit does not even attempt to deny that Petitioner did not know of the past and remote testing services that had been performed by Mr. Capacete's firm a year or more before the arbitration. The affidavit fails to deny that Petitioner's other attorneys, especially Mr. Robert Ruskin, who was practicing law in San Juan and actively representing the Petitioner when the arbitration proceedings were commenced and the arbitrators were being appointed, did not know of the former relationship. It does not deny that the experienced professional officers and the other members of the management of Petitioner in Puerto Rico did not know of the former relationships or of such other facts as to cause constructive knowledge of the relationship.

More conclusive and legally significant is the complete failure of the affidavit to claim even in general language that Petitioner or its many attorneys had acted reasonably or with ordinary care and diligence in investigating the arbitrators.

Instead of supporting Petitioner, the affidavit legally condemns Petitioner by the following clear and necessary implications:

1. The affidavit admits and confesses that the duty of inquiry and investigation was upon Petitioner and its many attorneys. Otherwise, why did the Peti-

tioner's attorney in its effort to overturn the award feel it legally necessary to make an affidavit that,

> ". . . I investigated the arbitrators to discover if any of them had, in the past or present, any business or financial relationships with A. C. Samford Overseas, Inc. . ." A. 54.

2. The affidavit admits and confesses the Respondents and their counsel had no legal or moral duty to volunteer any information not requested by Petitioner or its many attorneys in Puerto Rico and New York. This is clear because the affidavit expressly states, "None of the arbitrators ever informed me. . . ." A. 54. There is no suggestion that Petitioner, a large and experienced painting contractor, with many able Puerto Rican and New York counsel, members of management and owners, were not competent or able to protect their rights or ask for any information desired or to determine the qualifications and competency of the arbitrators selected to decide their substantial, prolonged, and heated dispute. The affidavit correctly recognizes that this adversary proceeding does not legally or morally impose upon the adversary or their attorneys any obligation to advise the opponent how to conduct and manage the opponent's case; such would have been presumptuous and contrary to the adversary-litigation process and law, as practiced, applied, and approved by the courts uniformly for centuries, in dealing with the qualifications and competency of judges, jurors or, more recently, arbitrators.

3. The affidavit is further discredited and impeached in that it states:

> "5—As a Lawyer, if I [Mr. Romero] had known of any such relationship, I would have challenged said arbitrator's capacity" (A. 54),

whereas the attorney who made the affidavit, on direct examination by his associate New York counsel, in answer to the question as to whether he would have objected had he known of the previous relationship, testified before the District Court, "I don't think I would have objected because I know Mr. Capacete. . ." (A. 151).

4. Also, this interpretation of the affidavit is totally inconsistent with the other many solemn stipulations and judicial admissions made in open court before the Federal District Judge by both Mr. Romero and his associate New York counsel, Mr. Korngold, that the Petitioners ". . . are in no way attacking the arbitrator's integrity. We believe him to be an honorable man" (A. 88), and Mr. Korngold's unequivocal statement, "I would like the record clear that at no time is Mr. Romero or myself accusing any of the arbitrators with doing anything fraudulent" (R. IV, 137 (2)).

5. The above allegation in the affidavit is also inconsistent with Petitioner's ratification and implied stipulation and judicial admission that the arbitrators were qualified and competent as reflected by the Petitioner's expressly stated consent and agreement that the court resubmit the issue to the same arbitrators to allow Petitioner additional opportunity for examining and rebutting evidence, with the expectation of further consideration and a new award by the same arbitrators. This is shown by the following:

> "The Court: Perhaps that may require that I resubmit the case to the arbitrators and have an additional hearing in which you are permitted to go over those documents.
>
> Mr. Romero: All right." A. 91.

The same type of consent, waiver and ratification of

the qualifications and competency of Mr. Capacete and the other arbitrators are clearly reflected by Petitioner's active participation and deliberate submission to Mr. Capacete and the other arbitrators for decision of the dispute regarding the effect, if any, on the arbitration award of a November, 1963, New York bankruptcy order staying litigation. R. V, 138 (35).

Furthermore, the affidavit of Mr. Romero in no way constitutes proof in this action. The affidavit was merely filed by Petitioner along with other pleadings (A. 21-22), the allegations of which were duly answered by Respondent's sworn answer (A. 62-73). Specifically, Respondent replied regarding the affidavit,

> ". . . Defendant denies that the affidavit dated February 6, 1964, of Carlos Romero proves anything with respect to Mr. Capacete and the validity of the arbitration award. . . ." A. 65.

Additionally, Respondents' attorney further denied and contradicted Petitioner's allegations at the hearing. A. 78-81. At the trial the affidavit was never introduced or admitted as evidence. A. 86-183.

This affidavit of Mr. Romero, for these legal and procedural reasons, is undeserving of consideration. However, Petitioner's attempt to now place primary reliance upon it, is reminiscent of Petitioner's attorney's, Mr. Romero's, proposition to the District Court regarding other recollections and testimony of Mr. Romero, ". . . I [Mr. Romero] testified under oath. . ," (A. 178), "So it is a matter of credibility" (A. 178).

The total discrediting and impeachment of the sworn testimony of Mr. Romero on his stated issues of "credibility" are judicial conclusions that warrant consideration

and recognition when this affidavit — given for the same purpose of attempting to overturn the award — is for any reason considered. Also, worthy of recollection are the many formal and serious agreements and stipulations regarding holding hearings on Sundays and holidays, waiving the "30 day rule," etc., that were later repudiated and disregarded for the same purpose of attempting to overturn the award.

## The June 25, 1963, letter of Overton A. Currie[14]

[14]The Court of Appeals requested in oral argument that Mr. Currie read from his letter of June 25, 1963; counsel for Petitioner did not object to and took no issue with said letter. For the Court's reference, the letter is quoted in full, as follows:

June 25, 1963

Board of Arbitration of A. C. Samford Overseas, Inc.
and Commonwealth Coating Corp. disputes

Attention: Mr. Jose L. Capacete and Mr. Dwight L. Chapman
RE: *Samford and Commonwealth Board of Arbitration*

Gentlemen:

We received a copy of the June 17, 1963 memorandum of Mr. Jose L. Capacete to Samford and Commonwealth reporting the untimely and unfortunate death of one of the arbitrators, Mr. Aaron Holman.

Samford would have been able to accommodate the hearing as anticipated and approved by the arbitrators to commence during the week of 24 June 1963. Samford regrets that Mr. Holman's death prevented this hearing and hopes that the vacancy created by his death will immediately be filled to permit the arbitrators to establish another date and the arbitration concluded at the earliest possible time.

Mr. Capacete indicated commitments for a Foundation Engineering seminar in Spain this coming fall would require him to spend time in Europe during the next month or so. While

Petitioner attempts to support its argument as to "concealment" by referring to a letter from Overton A. Currie, dated June 25, 1963, to counsel for Petitioner concerning the method of filling a vacancy on the Board of

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we do not interprete [*sic*] his letter as a resignation, he apparently indicates a willingness to step aside if his European commitments are going to unduly delay the arbitration.

In an effort to expedite the hearing and to prevent the loss of the efforts and understanding of the two arbitrators appointed by the opposing parties in agreeing upon and selecting Mr. Capacete as the third arbitrator, Samford has authorized us to stipulate that if Messrs. Capacete and Chapman will continue to serve, then Commonwealth may immediately appoint a third arbitrator to fill the vacancy created by the death of Mr. Holman, without Samford's consent but subject only to the right to object if the person selected is disqualified because of interests or involvements in the matters being arbitrated.

Inasmuch as a full arbitration board had already been appointed and the arbitration clause in the subcontract does not provide a means of filling a vacancy, in our opinion, under Puerto Rican law, the vacancy may be filled by appointment of a local judge. However, rather than suffer the disadvantages and inconvenience and the cost and delay associated with petitioning for such appointment and in an effort to act with fairness, Samford believes that its above suggested mode of filling the vacancy created by Mr. Holman's death will best accommodate the desires of all parties to expedite this matter to conclusion.

We know that Mr. Capacete is very busy and we appreciate the spirit of his letter. We are confident that both parties desire to preserve all that has been accomplished and agreed upon and join in respectfully requesting Mr. Capacete to continue to serve with the pledge that others involved will both understand and make every effort to accommodate his schedule and permit this matter to be heard and decided in the immediate future, and hopefuly in July and before it is necessary for him to go to Europe.

Arbitration following the death of Mr. Holman. The arbitration clause of the subcontracts did not provide for this contingency. A. 46-47. However, the Federal Arbitration Act provided such vacancy would be filled by the Court's designation of a replacement arbitrator if the parties did not otherwise agree. 9 U.S.C.A. §5. The parties were simply in the process of attempting to resolve how to select another arbitrator to replace Mr. Holman. A. 92. Neither this letter of Mr. Currie agreeing to the method of filling the vacancy nor any other evidence concerning this allegation was presented at the trial by Petitioner. A. 86-183. Petitioner nevertheless argues that counsel for Respondents by this letter "imposed a condition" that any substitute arbitrator selected

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Samford is now preparing in detail for the arbitration to permit its availability on short notice. The only conflict I have is a professional commitment to be in Texas during the weeks of July 8 and 15, but if this is the only time that Messrs. Capacete, Chapman and Mr. Holman's successor can serve and Commonwealth be available, then I will attempt to nevertheless arrange to be present at any time during those two weeks. However, may we respectfully suggest Monday or Tuesday, July 22 or 23, as the date to commence the arbitration. It should only require some two days to conclude.

Respectfully,

SMITH, SWIFT, CURRIE, McGHEE & HANCOCK

OVERTON A. CURRIE

CAC:ln

cc: C. A. Romero Barcelo, Esq.
Federico Ramirez Ros, Esq.
Mr. A. C. Samford, Jr.
Mr. Roger Dickinson

by Petitioner ". . . should have no prior business relationships with the parties." Br. of Pet., p. 13.

To support this allegation, Petitioner quotes only from the unsupported and incorrect oral argument to the District Court of its counsel, Mr. Romero (who made the previously discussed affidavit). This argument, as the quotation by Petitioner continues, is duly answered by Mr. Currie where he states that he merely reserved "the right to object because they [any proposed substitute arbitrators] have an interest *in the litigation* or are involved in *it*" (*Id.* at 14; A. 92) (emphasis added), and later again states his reservation to be that "the person didn't have an interest *in the arbitration*" (*Id.* at 15; A. 92) (emphasis added). Clearly Mr. Currie was not making a reservation concerning any and all previous business relations.

To further show that the reservation was limited to the particular matter in controversy as stated by Mr. Currie, Mr. Romero himself at an earlier hearing in oral argument correctly quoted the letter of Mr. Currie by stating that the agreement to the method of selection was "subject only to the right to object, if the person selected is disqualified because of interest or involvement *in the matter being arbitrated.*" A. 77. (Emphasis added.)

Therefore, it is clear that the reservation of a right to object by Mr. Currie was not nearly as broad as is contended by Petitioner. Furthermore, and what is more important, even if the broader reservation had been made, such a reservation obviously would not have constituted "concealment" of any sort, and the limited reservation actually made certainly could not be so construed. Mr. Currie was only reserving a right to object

if the person selected by Petitioner had an interest in the *matter in controversy* to guard against the possible implication that Respondents were unqualifiedly agreeing to *anyone* who might be selected by Petitioner. After all, the law allows one to consent to an interested person serving as arbitrator. As established by the cases hereinafter discussed, this was a right and reservation which Repondents were entitled to preserve, and surely such a normal and customary protection of one's rights cannot be interpreted as a "concealment" of information which had never been requested.

Additionally, and absolutely resolving against Petitioner this unwarranted issue is the fact that Mr. Capacete had been duly appointed, unchallenged, accepted and acting as an arbitrator and chairman of the Board of Arbitration at least since April 25, 1963, while the letter involved was written two months later on June 25, 1963. It could not possibly have misled Petitioner, for Mr. Capacete was duly appointed and serving well before it was written. Additionally, a statement of issues had been previously filed with Mr. Capacete and the other arbitrators by both parties, who had also suggested methods and dates for commencing the arbitration.

The official documents and records of the arbitration proceedings conclusively establish that Mr. Capacete had been duly appointed and was actively serving on the Board of Arbitrators with the knowledge, consent, and active participation of the Petitioner long before – two months before – the June 25, 1963, letter of Mr. Currie was written. It is more than obvious that it could not possibly have misled Petitioner.

Also, the reservation was clearly made only for the

benefit of Respondent Samford as regarded the replacement arbitrator to fill the vacancy on the Board of Arbitrators caused by the death of Mr. Holman. It obviously dealt with and was related only to this subject. It was clearly not written in response to any inquiry about Mr. Capacete and was clearly not representing anything about Mr. Capacete, who for some time had been serving as an arbitrator.

The magnitude and intensity of the heated and active dispute between the parties, two corporations, including many contested and contradicted contentions, beginning with the June and July, 1962 abandonment of the work by Petitioner and the resulting allegations of contractual *default* and *demand* for arbitration, the subsequent Federal Court litigation between Samford's surety companies and the controverted motion to stay the suit to await the arbitration outcome, during all of which time each party had engaged attorneys located in both Puerto Rico and the United States to defend their interests, clearly reveal that there was no fiduciary relationship or reliance between these adversaries to advise or volunteer unrequested information or suggestions to their opponent. Since the parties and their attorneys for a year had been adversaries engaging in active and contested litigation, there is no way Petitioner can in truth and fact argue with any reason or justification that the June 25, 1963, letter of Mr. Currie in any way misled the Petitioner.

The District Court also correctly and reasonably dismissed this unwarranted contention of Petitioner's by indicating Petitioner could have imposed the same condition, but had not. The Court asked Mr. Romero: "You

did not put the same condition?" (A. 89), and later concluded regarding this issue,

> "The Court: That argument, I am not going to pay any attention to that.
>
> Mr. Currie: No need to go into that?
>
> The Court: If they have the right they should have exercised it, regardless of whether your client insisted on that requirement as to the other arbitrator" (A. 92).

(3) *The Legal Authorities*

Petitioner advances the wholly technical and unfounded argument that under the Federal Arbitration Act an arbitration award should be automatically vacated on the ground of "evident partiality"[15] of an arbi-

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[15] *Black's Law Dictionary* defines "evident" as,

> "Clear to the understanding and satisfactory to the judgment; manifest; plain; obvious; conclusive, [authority cited]. Noticeable; apparent to the observation. [authority cited]. That is 'evident' that suggests more than a mental process, but no difficulty in seeing that the thing is true. [Authority cited.]" BLACK, LAW DICTONARY, 4th Ed. (1951).

*Webster's Dictionary* defines "partiality" as,

> "the quality or state of being partial: a: the inclination to favor one side (as of a conflict or question): BIAS . . . B: a predilection or fondness for one person or one thing rather than others; special taste or liking . . . syn. predilection."

and defines "partial" as,

> "1: inclined to favor one party in a cause or one side of a question more than the other; BIASED, PREDISPOSED . . . 2a (1): having a predilection for a certain person or thing: favorably disposed toward someone or something; biased or prejudiced in one's favor (2): inclined to favor a cer-

trator if the losing party, who prior to the award has made no inquiry of the arbitrator or the other party, learns after the award has been rendered that there was any past business relationship between the other party and the arbitrator, even though such losing party acknowledges such past relationship has had no effect on the proceedings or on the award. Restated, Petitioner contends that if a party or an arbitrator does not volunteer information concerning past business relations, *which information has in no way been requested by the losing party,* this fact alone should be an adequate ground under the Federal Arbitration Act for avoiding and overturning the results of all the work and efforts of the many persons involved in resolving the dispute, regardless of how remote, unrelated, and insubstantial the relationship was or when in the past such relationship occurred and even though such past relationship is admitted to have had no effect on the proceedings or the award and even though such past relationship was known to all or easily discoverable by simple inquiry of others involved who were both always available and often in the presence of and in communication with the complaining party, who waited until he lost the arbitration to so inquire. This position is not only inconsistent with the express language of the Act, but is contrary to the great weight of legal authority and the concept of fair and practical arbitration.

In order to set aside an award, the general rule is that the complaining party must show that the award was the result of an actually biased, partial or fraudulent

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tain person or thing excessively. . . ." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED (1966).

decision, a much greater showing than of the mere existence of a non-disclosed past relationship. The general and pervading policy is clear, that the courts favor settlement of disputes through arbitration proceedings and will not set aside an award without a clear showing of facts indicating the absence of a fair hearing. 5 Am.Jur.2d *Arbitration and Award* § 167. *American Jurisprudence 2d* states the rule as to vacatur of awards as follows:

> "Though *the courts look with favor on arbitration proceedings and make every presumption in favor of the validity of awards,* this is done on the assumption that these awards constitute the *honest judgment* of the arbitrators, rendered after a *fair hearing*. Consequently, when there is *positive evidence of fraud or collusion* on the part of the arbitrators, they lose all claim to the favor of the courts and, under equitable principles, the awards will will *(sic)* be set aside. Where there has been fraud, the arbitrators have not really acted within the lines of the duty laid upon them; they have not in fact carried out the agreement under which they obtained authority to act. *Corrupt motives, however, are not lightly to be ascribed to the arbitrators."* 5 Am.Jur.2d *Arbitration and Award* § 173. (Emphasis added.)

There is no doubt that positive evidence of actual fraud, collusion, bias or partiality is required before a court will set aside an arbitration award. Courts presume the award is valid and the arbitrators (selected as the contracting parties agreed) faithfully decided the dispute. Only clear, substantial and convincing evidence will invalidate the award, and overcome this universal presumption.

Petitioner quotes on page 21 of its brief on the merits

from 5 Am.Jur.2d *Arbitration and Award*, § 181, apparently in support of its argument that no evidence of actual partiality, bias or fraud is required in order to set aside an award. However, this quotation indicates the opposite is true, because it must be shown that the relationship would "render it unlikely that they [the arbitrators] constituted the fair and impartial tribunal to which the other party is entitled." The paragraph following the paragraph quoted by Petitioner elaborates on what is required to set aside an award and shows clearly that the evidence must indicate *actual* interest or bias before an award will be vacated,

> "An interest or bias to disqualify may be small, but *it must be direct, definite, and capable of demonstration, not remote, uncertain, or speculative.* A person may be disqualified if he is a close relative, servant, employee, or agent of one of the parties, or has any secret interest in the result or decision of the dispute. And where the relationship is not sufficient per se to warrant equitable interference, it will be considered in the light of all the other circumstances of the case, such as the conduct of the arbitrators, or the size of the award. If, when taken as a whole, partiality is evident, the award will be set aside. *But courts will not interfere under their equity powers where the relationship of the parties is casual or such as not to give rise to an inference of unfairness.*" 5 Am.Jur.2d *Arbitration and Award*, § 181. (Emphasis added.)

**The Federal Cases**

The District Court below relied on the case of *Ilios Shipping and Trading Corp. v. American Anthracite & Bituminous Coal Corp.*, 148 F.Supp. 698 (S.D.N.Y. 1957), aff'd 245 F.2d 873, in holding that Petitioner had failed to show "evident partiality" on the part of Mr.

Capacete. *Ilios Shipping* is the leading case under the Federal Arbitration Act regarding the effect of prior business relationships between an arbitrator and a party on the validity of an arbitration award. In *Ilios Shipping* the arbitrator was an employee of an insurance agency that placed insurance from time to time for an agent of one of the parties to the arbitration proceeding. The court held that this did not constitute sufficient evidence to show "evident partiality" under §10 (b) of the Federal Arbitration Act. The court stated in its holding that,

> "Something more than a vague and rather remote business relationship between the arbitrator and one of the parties to the arbitration is certainly needed if the losing party seeks to vacate the award on the ground of 'evident partiality' of one of the arbitrators. *It is well established that the mere fact that there is some business relationship between the arbitrator and one of the parties to the arbitration is not in and of itself sufficient to disqualify the arbitrator. E. Richard Meinig Co. v. Katakura & Co., Ltd.*, 1 Dept. 241 App. Div. 406, 272 N.Y.S. 735, affirmed 1934, 266 N.Y. 418, 195 N.E. 134." 148 F.Supp. 698, 700. (Emphasis added.)

In the case at bar all that Petitioner has shown is that there were remote, unrelated and casual business relations between the company with which Mr. Capacete was associated, Foundation Engineering Company, and Respondent Samford, and that all of these isolated transactions had been concluded a year or more before the arbitration proceedings. *Supra,* at 16-28. The amount of business with Samford was an insubstantial part of the business of Foundation Engineering Company, only approximately one percent. A. 139, 141. The fees charged were the reasonable and ordinary fees for such services.

A. 65. Furthermore, although Foundation Engineering Company performed a very small amount of foundation or concrete testing work on several of the large government projects involved in the arbitration proceedings, these services were performed long before the disputes arose and had nothing whatsoever to do with the painting work performed by Petitioner or with Petitioner itself or the issues involved in the arbitration. A. 135-142. Mr. Capacete personally had little to do with performing these testing services, less than 10%, and then acted only in behalf of his employer corporation, the Foundation Engineering Company in which he had only a part interest. A. 141. Mr. Capacete also was a Professor of Engineering at the University of Puerto Rico and a partner in another architectural-engineering firm, Capacete, Martin & Gutierrez, which never performed services for Samford. A. 142.

The court in *Ilios Shipping* stated further, with regard to the failure of the complaining party to carry its burden of proof, that,

> "No facts were submitted by respondent to show any substantial financial or business interest of Mr. Ellison [the arbitrator] in petitioner or in the business of the petitioner." 148 F.Supp. 698, 700.

Likewise, in this case there has definitely been no allegation or evidence that Mr. Capacete or Foundation Engineering Company had any interest whatsoever in A. C. Samford Overseas, Inc. or in the outcome of the arbitration. There has not even been any allegation or evidence of the possibility of any future business relationship. To the contrary, the record shows a year or more had passed since any relationship (A. 139), and no future relations could occur since Samford was closing its Puerto Rico operations (R. XVI, 159 (18-19)).

The legal requirement as stated and followed in *Ilios Shipping* is not that a party to an arbitration proceeding or an arbitrator must automatically, without solicitation, voluntarily furnish information as to past business relationships, but that a party instead must make reasonable inquiry concerning these relationships if he wants such information and is held bound by whatever he knows or would have known from such inquiry. In *Ilios Shipping* the protesting party knew that the arbitrator was employed by the particular insurance agency, and on this basis the court held,

> "Respondent could have inquired concerning the business relationship of his firm to any party interested in the arbitration." 148 F.Supp. 698, 700.

Failure so to inquire with knowledge of these facts was held to be a waiver of any objection which the protesting party may have had. Here, Petitioner through its attorney who was a close friend of Mr. Capacete and fellow member of the same Rotary Club had complete information concerning the nature of Mr. Capacete's professional work and associations and the nature of Samford's business and could have easily inquired of any business relationship. A. 146. This duty and opportunity of inquiry should be especially observed in this case where Petitioner knew or should have anticipated that a contractor with such a large volume of work in Puerto Rico as Samford would have used the construction engineering, testing, or consulting services of professional engineers so prominent in Puerto Rico as Mr. Capacete and Foundation Engineering Company. A. 66, 142. See *San Carlo Opera Co. v. Conley*, 72 F.Supp. 825 (S.D.N.Y. 1946), aff'd 163 F.2d 310. It is natural and logical to assume the reason Petitioner did not ask Sam-

ford was because Petitioner either already knew of the past relationship, or at least knew all it desired to know.

It is highly significant that Petitioner says an "investigation" was made prior to the hearings without discovery of the relationship. Br. of Pet., p. 7-8. This allegation can only clearly reflect a recognition that it is incumbent on a party so to inquire. However, the inadequacy of such "investigation" is manifest when none of the interested parties was ever asked about relationships (*supra*, at 16-32); surely Respondents are not to be responsible for such a curious and unexplained failure by Petitioner.

In *Texas Eastern Transmission Corporation v. Barnard*, 177 F.Supp. 123 (D.C.K.Y. 1959), rev'd on other grounds, 285 F.2d 536 (6th Cir. 1960), a far closer relationship than in the case at bar existed between the *sole* arbitrator and the successful party in the arbitration. The arbitrator was an officer and an employee of a bank which was represented as general counsel by the law firm of the attorney for the successful party; the attorney was personally a stockholder in the bank and the attorney's firm was shown to be counsel for the president of the bank and at least six of the seven directors of the bank. The court held that these facts did not warrant vacatur of the arbitration award under the Federal Arbitration Act. The court stated in its holding,

> "Something more than such a vague and rather remote business relationship is needed if the losing party seeks to vacate an award on the ground of evident partiality. [Citing *Ilios Shipping, supra*]." 177 F.Supp. 123, 128.

Petitioner has shown that only a vague and rather remote business relationship existed between Samford and

Foundation Engineering Company. A. 136, 139-142. Even this relationship was terminated a year or more before the arbitration. A. 139.

In *Texas Eastern* the arbitrator's employer and the prevailing party used a common law firm, a relationship existing at the time of the arbitration, and at least with regard to the bank, its president and its board of directors this was apparently a continuing relationship. Moreover, the party's attorney even owned stock in the bank. As stated, in the case at bar there was no such current, immediate, on-going relationship between Foundation Engineering and Samford, but the last transaction had occurred a year or more before the arbitration. A. 139. Nor was there any interest on the part of Samford, the other Respondents or their representatives in Foundation Engineering or any other entity with which Mr. Capacete was affiliated; the relationship which had existed in this case indeed was far more vague and more remote than in *Texas Eastern*.

Earlier the Sixth Circuit had occasion to state in *Kentucky River Mills v. Jackson*, 206 F.2d 111, 47 A.L.R.2d 1331, (6th Cir. 1953), cert. den. 346 U.S. 887, 74 S.Ct. 144, 98 L.ed. 392,

> "But it is the proof of bias or unfairness or partiality on the part of an arbitrator that results in unjust advantage, and calls for the setting aside of the award." *Id.* at 117. (Emphasis added)

As indicated by *Kentucky River Mills* and by the other cases discussed above, there must be a showing of facts to warrant the conclusion that the relationship between an arbitrator and a party was such as to conclude that there was a corrupt or unjust effect of some sort on the

arbitration before an award will be vacated. Petitioner has not alleged or provided any evidence that Mr. Capacete in any way gave Rumford an "unjust advantage" or that the relationship had any effect on the award. To the contrary, Petitioner, through its attorney, expressly has admitted such did not occur by repeatedly admitting the honesty, integrity and ability of Mr. Capacete. A. 75, 80-81, 88.

A recent Second Circuit decision, *Saxis Steamship Co. v. Multifacs International Traders, Inc.*, 375 F.2d 577 (1967), outlines the procedure to be followed by a court when a challenge of partiality is presented. The court summarized,

> "It is true that when a claim of partiality is made, the court is under an obligation to scan the record to see if it demonstrates 'evident partiality' on the part of the arbitrators. [Authority cited.] The burden of proof on this issue in the confirmation proceedings in the District Court rests upon the party making the claim. . . ." *Id.* at 582.

Such a "scanning" of the record in this case can only reveal that the proceedings were totally fair and the arbitrators were wholly impartial, providing the parties with a just hearing of their dispute. And referring to the Supreme Court's discussion in *Wilko v. Swan*, 346 U.S. 427, 74 S.Ct. 182, 98 L.ed. 168 (1953) concerning overturning an award where there has been a "manifest disregard" of the law, the Second Circuit states,

> "Any such exception must be severely limited, *because extensive judicial review frustrates the basic purpose of arbitration, which is to dispose of disputes quickly and avoid the expense and delay of*

*extended court proceedings.* [Authorities cited.]" *Ibid.* (Emphasis added.)

The some six years of litigation in this case are an unfortunate testimonial to what can happen to a remedy supposedly quick, efficient and inexpensive. Petitioner is proposing a technical, theoretical and abstract test of what is to be deemed "evident partiality" rather than a rule based on the facts, the evidence, and the practical and warranted conclusion to be drawn; the argument of Petitioner concludes that the award should be vacated although there is admittedly no effect of the remote and past business relations on the unanimous award of highly respected and honorable professional experts, who were legally guided by the lawyer-arbitrator appointed by Petitioner.

**New York Cases**

There have been a number of cases decided under the New York statute, N.Y. Civ. Prac. §§7501-7514, and its predecessor statute, interpreting what constitutes "evident partiality." The principal cases reflect the rule that definite and discernable partiality must be shown, not a mere business relationship by itself, much less a remote relationship occurring a year or more before the arbitration, before an award is to be vacated on the ground of "partiality."

In the case, *E. Richard Meinig v. Katakura & Co.*, 241 App. Div. 406, 272 N.Y.S. 735 (App. Div., 1934), affirmed 266 N.Y. 418, 195 N.E. 134, relied on by the Second Circuit in *Ilios Shipping, supra.*, both parties to the arbitration were dealers in silk. The *third arbitrator* selected by the two arbitrators named by the parties was an officer of a firm which, from time to time, purchased raw silk from a party to the arbitration, Katakura & Co.

The trial court had held that the arbitrator's firm was under "definite obligations" to Katakura and vacated the award. The Appellate Division reversed and the Court of Appeals then affirmed, holding that this business relationship between a buyer and seller was not sufficient to invalidate the arbitration award. The Appellate Division stated in its holding,

> "It is idle to urge that, simply because of his connection with a corporation which occasionally purchases raw silk from the appellant, he was thereby disqualified from acting as an impartial member of the Board of Arbitrators. If we were to give heed to the contentions of every unsuccessful litigant, based upon the flimsy ground assigned here, *it would be well nigh impossible to carry out that part of the contract pertaining to arbitration, which is usually found in agreements entered into by silk merchants.*" 272 N.Y.S. 736. (Emphasis added.)

In the case at bar the relationship was that of independent engineering consulting firm providing unrelated testing of sand, gravel, concrete, and compaction of soil from time to time on an isolated, piecemeal, arms-length basis, which services had been concluded and terminated prior to the dispute between the parties and approximately a year or more before the arbitration proceedings. A. 139. Furthermore, these engineering services had nothing whatever to do with painting, the issues involved in the arbitration or the business of Petitioner. A. 139. There is less significance in the past and remote relationship in the case at bar than the apparently continuing relationships involved in the *Ilios Shipping* case of insurance purchaser and insurance agent and that involved in the *Meinig* case of customer and supplier. Thus, reaching the same result of upholding the award

in this case as in the *Ilios Shipping* and *Meinig* cases would be even more justified, sound, and warranted.

The *Meinig* case points out a most important practical factor relevant to the case at bar: an arbitrator is often selected because of his possessing particular skills or experience in the type of business where a dispute has arisen and therefore he should not be disqualified merely because he has had previous business relationships with one or more of the parties to the arbitration proceeding participating in that business. The court in the *Meinig* case indicated that it would be "well nigh impossible" to carry out arbitration proceedings in the silk business if one could set aside proceedings simply on the basis of previous business relationships, because it was on the basis of such experience that such arbitrators were chosen in the first instance. It is submitted that the same sound and practical reasoning applies to the case at bar where the well-known professional competence of a Puerto Rican consulting construction engineer was sought to resolve disputes concerning five large Puerto Rican construction projects. It is of great significance that Foundation Engineering Company was the only firm in Puerto Rico performing such engineering services prior to 1957, the larger of two such firms in Puerto Rico between 1957 and 1959, and one of a total of only three such firms in Puerto Rico after 1959. A. 141-142. Even the District Court below acknowledged the high professional reputation of Mr. Capacete by commenting from the bench that he believed him to be "the most competent man" in his business in Puerto Rico. A. 81. Equally important is the fact Petitioner's attorney repeatedly admitted his integrity and honorable standing. A. 75, 80-81, 88. It is only logical to assume under these circumstances

that most contractors in Puerto Rico would have had occasion to use these common and customary construction testing services, and this was confirmed by the testimony of Mr. Capacete. A. 142.

In the more recent and the leading New York case, *Cross Properties, Inc. v. Gimbel Brothers, Inc.*, 225 N.Y.S. 2d 1014 (App. Div. 1962, aff'd 236 N.Y.S. 2d 61 (Ct. App.), it was again held that although a party and the *third arbitrator* had had prior business relationships, nevertheless such relationships did not disqualify the arbitrator. The Appellate Division stated,

> "Where there are undisclosed dealings between a party and an arbitrator which impart a lack of impartiality and fairness, the award made is subject to vacatur. . . . *However, this is not to say that any undisclosed relationship, no matter how peripheral, superficial or insignificant, compels the same result.* 'Courts are loathe to sustain belated claims of disqualification after an adverse award.' (Matter of Atlantic Rayon Corp. [Goldsmith], 277 App. Div. 554, 556, 100 N.Y.S.2d 849, 850). . . . The type of relationship which would appear to disqualify is one from which it may not be unreasonable to infer an absence of impartiality, the presence of bias or the existence of some interest on the part of the arbitrator in the welfare of one of the parties. While there was a 'relationship' here between the respondent and the arbitrator, we find it not to be a disqualifying one. *The transactions between them were isolated and involved nothing of such a nature as would cause Spear to act other than with requisite impartiality. The nature and magnitude of the real estate company with which Spear was affiliated would make it most likely that at one time or another there would be some contact with one of the largest department stores in the City of New York.*

> *Whether or not Spear disclosed such relationship to the tribunal clerk is of no consequence. The rules of the arbitration association required a disclosure only if the circumstances were 'likely to create a presumption of bias' or were such as would make the arbitrator believe 'might disqualify him as an impartial arbitrator.' In the light of the nature of the relationship, a failure to disclose would not have been violative of the rules."* 225 N.Y.S.2d 1014, 1016-1017. (Emphasis added.)

It is submitted that proof in the case at bar shows that the relationship between Foundation Engineering Company and Respondent Samford was in fact superficial and insignificant and that the transactions between the parties were isolated and none occurred within a year or more before or during the arbitration proceedings. A. 136, 139-142. Moreover, Petitioner has made no allegation that the relationship had any actual effect on Mr. Capacete or the outcome of the arbitration proceedings. Thus there can be no doubt that, as in *Cross Properties*, there is here nothing of such a nature as would have caused Mr. Capacete, a professor and an admittedly honorable professional engineer (A. 75, 80-81, 88) of the highest reputation "to act other than with requisite impartiality."

Additionally, the arbitrator in *Cross Properties* had been selected pursuant to the rules of the American Arbitration Association and consequently an affirmative duty to disclose possibly disqualifying relationships had been incorporated by contract. As no such duty was incorporated in the subcontracts with Petitioner, there is far more reason to sustain the award in this case than in *Cross Properties*. Even under the stringent Association rule of disclosure, *Cross Properties* held the relationship

was not the sort that had to be revealed, and the court intimated that the losing party was bound by those facts he could reasonably have expected to have existed. In the case at bar Petitioner, if it did not actually know of the past relationship, should most definitely have expected such a relationship to have occurred between a major contractor in Puerto Rico and probably the leading construction engineering testing and consulting firm in Puerto Rico, a "contract" certainly no less to be anticipated than that between a large real estate company in New York and Gimbel's.

There is an abundance of other legal authorities supporting Respondents' position that to vacate an award and allow an unsuccessful litigant to reopen decided disputes there must be positive proof of actual partiality, bias or fraud or some other actual misconduct and a showing of the reasonable and probable likelihood of adverse effect of such conduct on the award, far more than only a showing of the mere existence of a relationship which was not disclosed. *Fireman's Fund Ins. Co. v. Flint Hosiery Mills,* 74 F.2d 533, 104 A.L.R. 556, (4th Cir. 1935), cert. den. 295 U.S. 748, 55 S.Ct. 826, 79 L.ed. 1692 (1935); *The Hartbridge,* 62 F.2d 72, (2nd Cir. 1932), cert. den. 288 U.S. 601, 53 S.Ct. 320, 77 L.ed. 977 (1933); *National Fire Ins. Co. v. O'Bryan,* 75 Ark. 198, 87 S.W. 129 (1905); *Cecil v. Bank of America Nat'l Trust & Sav. Ass'n,* 107 Cal.App.2d 38, 236 P.2d 408 (1951); *Riccomini v. Pierucci,* 54 Cal.App. 606, 202 P.344 (1921); *Giddens v. Board of Educ. of City of Chicago,* 398 Ill. 157, 75 N.E.2d 286 (1947); *First Nat. Bank in Cedar Falls v. Clay,* 231 Iowa 703, 2 N.W.2d 85 (1942); *Young v. New York Underwriters Ins. Co.,* 207 N.C. 188, 176 S.E. 271 (1934); *Knicker-*

*bocker Textile Corp. v. Leifer Mfg. Corp.*, 278 App. Div. 351, 105 N.Y.S.2d 200 (1951); 6 WILLISTON, CONTRACTS § 1923A. See *Karppinen v. Karl Keifer Machine Co.*, 187 F.2d 32 (2nd Cir. 1951); *General Construction Co. v. Hering Realty Co.*, 201 F.Supp. 487 (E.D.S.C. 1962) appeal dismissed; 312 F.2d 538 (4th Cir. 1963), *Cf. Wilko v. Swan*, 346 U.S. 427, 74 S.Ct. 182, 98 L.ed. 168 (1953); *Amicizia Societa Nav. v. Chilean Nitrate & Iodine S. Corp.*, 274 F.2d 805 (2nd Cir. 1960), cert. den. 363 U.S. 843, 80 S.Ct. 1612, 4 L.ed.2d 1727 (1960).

**The Cases Relied Upon by Petitioner are Clearly Distinguishable and Do Not Have Any Bearing On the Case at Bar.**

*Rogers v. Schering Corporation,* 165 F.Supp. 295 (D.C.N.J. 1958), aff'd 271 F.2d 266, cert. den. 359 U.S. 991, the case principally relied upon by Petitioner, concerned an arbitration clause in a written contract which required that the parties submit disputes to arbitration pursuant to the rules of the American Arbitration Association and to select arbitrators from panels furnished by the American Arbitration Association. The District Court, in an elaborate and detailed discussion, held that Section 18 of the American Arbitration Association rules expressly and specifically required disclosure by the Arbitrator to the parties of "any circumstances likely to create a presumption of bias or which he (the arbitrator) believes might disqualify him as an impartial arbitrator." Thus, these Association rules in practical effect specifically and expressly "ask" or "inquire" of the arbitrator about possible disqualifications. Naturally a party who by contract agrees to be bound by these American Arbitration Association rules has the right to rely upon their being followed and performed. It is also most significant that even these rules place absolutely no duty on the other party to volunteer such information.

Since in the *Rogers* case information of this sort had not been furnished by the Association to the parties in violation of this express Association rule and provision although the arbitrator had furnished the information to the Association, the court vacated the award.

In practical effect, the parties in *Rogers* expressly *contracted* for disclosure to be made by the arbitrator of

disqualifying relationships by incorporating the Association rules. In the case at bar the parties made absolutely no reference in their contracts to the American Arbitration Association or its rules. No such disclosure provision of any kind requiring the disclosure of any such information was incorporated or provided in the contracts. A. 46-47. Thus if either of the two corporations agreeing to this arbitration desired such information, it had to inquire. The general and practical rule that there is no such duty of volunteering unsolicited information remains properly controlling of the case at bar. The mere fact that isolated and remote business relations existed a year or more before the arbitration is not sufficient alone to vacate an award. This is a reasonable, practical, and understandable rule and result. If such information is desired by a party to arbitration proceedings, the obligation rests upon that party simply to inquire of the arbitrator or other party whether such business relations have occurred.

Interestingly enough, the objecting party in *Rogers* did investigate the arbitrator and discovered the relationship during the arbitration proceedings and made known its objection at that time. Even with the American Arbitration Association rules expressly incorporated by contract, the facts of the *Rogers* case reflect the reasonable actions and care taken by an ordinarily prudent party to an arbitration in protecting any rights it does not wish to be waived.

In *Milliken Woolens, Inc. v. Weber Knit Sportswear, Inc.*, 11 A.D.2d 166, 202 N.Y.S.2d 431 (1960), aff'd 9 N.Y.2d 878, 175 N.E.2d 826, the New York court held that the two arbitrators who had decided the dispute before the arbitration board in favor of Milliken Woolens

should be disqualified on the basis of the unusual facts of the case and because of the close relationships existing between two arbitrators and Milliken Woolens. It was shown that one arbitrator, an attorney, had previously been a member of the same law firm as the trial counsel for Milliken Woolens and the arbitrator's firm had served in a number of matters as co-counsel with the firm representing Milliken Woolens, one of which was pending at the time of the arbitration. Although this close relationship existed, this arbitrator merely advised Weber Knit that he was "acquainted" with each of the attorneys of the parties, and the court felt that this statement may well have "misled" Weber Knit. The second arbitrator, among several other substantial relationships with Milliken Woolens, had for many years purchased a considerable part of the requirements of his business from Milliken Woolens or its affiliates, the numerous transactions amounting to millions of dollars. On the basis of these as well as other factors, the court held that both arbitrators should be disqualified.

In the case at bar there was never any close relationship between Mr. Capacete and Samford such as co-employee. The limited relationship occurred a year or more before the arbitration and consisted of only isolated and remote transactions between independent contractors, a construction company and a professional consulting corporation doing construction testing, of which Mr. Capacete was only a part owner. A. 136, 140. Furthermore, as discussed above, there is absolutely no possibility in the case at bar that Petitioner was in any way "misled" by Mr. Capacete or Respondents or their counsel as the court found in *Milliken Woolens*. The importance of this difference is stressed by the Appellate Division later in *Cross Properties, supra,* in distinguish-

ing the facts in *Cross Properties* from *Milliken Woolens*, as follows:

> ". . . there [in *Milliken Woolens*] the relationship between one of the arbitrators and the attorneys for one of the parties was such that there could be no question but that it could reasonably be inferred that there was present partiality or bias. In addition, there the arbitrator had not only failed to disclose the true relationship *but had also made affirmative statements concerning the same which were less than the truth and—one must conclude—were designed to mislead*. Not so in this case. 225 N.Y.S.2d 1014, 1017. (Emphasis added.)

Here the past, occasional and remote testing services involved an amount of money that was most insignificant compared to the millions of dollars of business involved in *Milliken Woolens* and compared with the volume of business of Foundation Engineering Company. The court in *Milliken Woolens* actually indicates that under different circumstances, such as in the case at bar, the decision should be the opposite from that reached in *Milliken Woolens*, by stating with regard to the number of transactions involving millions of dollars between the firm of the arbitrator and Milliken Woolens,

> "They may not be regarded as *the casual or occasional dealings which might be expected where arbitrators are chosen because of familiarity with an industry*. [Authorities cited.]" 202 N.Y.S.2d 431, 435.

In the case at bar we have exactly the situation where there have been only "casual or occasional dealings" and where the arbitrator, Mr. Capacete, could be expected to have had such dealings through Foundation

Engineering Company because of his expert professional knowledge of the construction business. And even these transactions occurred a year or more before the arbitration.

*Milliken Woolens* is distinguishable for an additional reason of utmost importance for, as in *Rogers v. Schering Corporation, supra,* the arbitration was conducted under the rules of the American Arbitration Association, and the parties by agreement had required disclosure of disqualifying relationships, which duty had been violated by the arbitrators' failure to disclose what the court found to be, and could hardly have avoided finding, such disqualifying relationships. There was no such agreement to disclose in the case at bar, which is a fundamental difference entirely aside from the fact there were no such disqualifying relationships between Mr. Capacete and Samford or the other Respondents.

In *Matter of Friedman,* 215 App.Div. 130, 213 N.Y.Supp. 369 (1926), relied upon by Petitioner, it was found that a very substantial financial relationship existed between a party and one of the arbitrators considerably different from an ordinary business relationship. *The party had loaned the arbitrator $5,000 during the arbitration proceedings,* causing the arbitrator to be in debt to the party at the time of deciding the controversy. In the case at bar there were no business relations between Mr. Capacete or Foundation Engineering Company and Samford during the course of the arbitration proceedings, and even all of these occasional past, remote business relations had been completely terminated a year or more before the arbitration. A. 139; R. III, 116 (6). Furthermore, in *Friedman* there was evidence

of actual partiality or bias, as the court states there was a showing that the arbitrator,

> ". . . manifested the utmost bias in favor of the party who befriended him, and refused to listen to argument or evidence in support of the claims of the opposing party." 213 N.Y.S. 369, 376.

In the case at bar there is not even an allegation of actual bias or partiality, but the admission was made such did not occur. A. 75, 80-81, 88. Also, here the District Court expressly found that "the record shows that the arbitrators conducted fair, impartial hearings." A. 185. Therefore the *Friedman* case is obviously distinguishable.

In *American Guaranty Co. v. Caldwell,* 72 F.2d 209 (9th Cir. 1934) the trial court had held that the appointment of an arbitrator was irregular and illegal and vacated the award on the ground of evident partiality. The 9th Circuit Court of Appeals affirmed, expressly resting its conclusion that the arbitrator was "inherently partial" on *two* grounds, "taken together": (1) "the method of appointment as provided in the agreement was not followed" (which is a sufficient ground alone for voiding an award), and (2) "the arbitrator appointed had a business relationship with one of the parties." *Id.* at 212. The court does not say, as argued by Petitioner (Br. of Pet. at 21), that the latter ground alone would require vacatur, but instead is compelled to rely on *both* grounds; nor does the court find it necessary, in view of the fact the appointment was otherwise illegal and not in accord with the agreed method of appointing, to discuss the details of the "business relationship." Most significant, however, is the indication that there was *actual*

partiality; the Court of Appeals summarized the District Court's decision as, in part, holding, "that his [the arbitrator's] *actions* as umpire were partial to appellant." *Id.* at 211. (Emphasis added.) Thus, for these reasons this case is no authority for the proposition that any past business relationship per se will disqualify irrespective of its remoteness and insubstantial nature.

The case of *Knickerbocker Textile Corporation v. Sheila Lynn, Inc.*, 172 Misc. 1015, 16 N.Y.S.2d 435 (1939) involved an arbitration proceeding where the third arbitrator was treasurer of a company which had just received a favorable award in another arbitration proceeding in which one of the arbitrators who had voted for the award was the president of Knickerbocker Textile Corporation. The Court summarized this relationship, "Granowitz [the president of Knickerbocker] decided for Arnoff's company and Arnoff [the arbitrator being challenged], in turn, decided for Granowitz's, 16 N.Y.S.2d 435, 437. The Court additionally found that the Director of the Arbitration Bureau of the Silk Association had made inquiry of the parties and the arbitrators concerning objections to the arbitrators who had been selected, and that upon this inquiry the challenged arbitrator, Mr. Arnoff, should have revealed the facts about the previous arbitration proceeding. The court found that such failure to reveal constituted "misbehavior," but did not hold that this was partiality under the New York Statute, 16 N.Y.S.2d 435, 447.

There was obviously no such "misbehavior" on the part of Mr. Capacete, and none has been charged. As he testified, no inquiry was made of him. A. 146. There had been no recent relationship between Mr. Capacete and Samford as in *Knickerbocker* where the award in the

prior arbitration was rendered only three days before Mr. Arnoff received notice of his appointment as arbitrator. For these reasons, the Knickerbocker case is clearly inapplicable to the case at bar.

*Merolla v. Motor Vehicle Accident Indemnification Corporation,* 231 N.Y.S.2d 760 (1962), cited by Petitioner, is distinguishable for two principal reasons. First, the arbitration was under the rules of the American Arbitration Association, incorporating by contract, therefore, a provision and rule expressly requiring the furnishing or *"volunteering"* of information as to relations likely to disqualify, as in *Rogers v. Schering Corporation, supra.* Totally significant is the fact that such a provision is not present in the arbitration agreement here. Secondly, the business relation was very close, the sole arbitrator being employed as the attorney of record in the auto liability division of a member company in the party's corporate structure. There was no such employer-employee relationship in the case at bar.

Petitioner cites *Astoria Medical Group v. Health Insurance Plan* 11 N.Y.2d 128, (227 N.Y.S.2d 401) (1962) and the amendment enacted in 1962 to the New York arbitration statute, N.Y. Civ. Prac. §§ 7501-7514, in making the argument that a party's arbitrator may be partisan or biased, but the third arbitrator should not be. However this distinction has no bearing on the authorities relied upon by Respondents. Unless there is a statute or a contract term to the contrary, the vast majority of the decisions make no distinction between party-appointed arbitrators and the third arbitrator in ruling upon their qualifications.[17] See, *e.g., Ilios Shipping,*

[17]See Case Note, *Party-Nominated Arbitrator In Tripartite Arbi-*

*supra,* and *Texas Eastern, supra.* Additionally, the *Meinig* and *Cross Properties* cases, *supra,* are cases where the challenge was to the alleged partiality of the *third arbitrator* due to business relations with a party.

Cases where arbitration awards have been vacated, including the cases principally relied upon by Petitioner, may be summarized as involving circumstances reasonably giving rise to at least a warranted conclusion, and in most cases actual proof, that the losing party did not receive a fair hearing; there is always present in these cases either the facts to warrant the inference or actual proof that the disqualifying relationship has had some corrupting or unfair effect on the proceedings and the award. See, *e.g., Milliken Woolens, supra.* Additionally, in cases where the rules of the American Arbitration Association are incorporated by contract, the burden of making inquiry concerning disqualifying relationships is expressly and by contract placed on the Association, and therefore where disclosure of such a relationship has not occurred as required by the arbitration agreement, the award must be vacated because of the failure to follow the contractual procedure and requirement for disclosure, not because of any failure to comply with any alleged duty otherwise existing to volunteer unsolicited information of such a nature. See, *e.g., Rogers v. Schering Corporation, supra.* Petitioner does not argue that the arbitration proceedings were unfair in any way or attempt to cast any suspicion on Mr. Capacete, and many times stipulated or admitted otherwise. A. 75, 80-81, 88. Also, as stated, the District Court specifically found that the record showed the arbitrators conducted

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*tration Agreement Not Disqualified Because of Partisanship,* 14 Syracuse L. Rev. 102, 103 (1962).

"fair, impartial hearings." A. 185. Nor is any argument made that there was a violation of any contractual duty to disclose. Consequently, the cases cited by Petitioner clearly do not support the position Petitioner has taken.

(4) *The Legislative History of the Federal Arbitration Act*

The legislative history of the Federal Arbitration Act reflects two principal purposes of the legislation: (1) the Act was to make enforceable and irrevocable arbitration agreements as a private, contractual remedy, and (2) to avoid the "evils" of the delays and the expense of litigation and the sometimes unsatisfactory results obtained in litigation not consistent with the practices and practical requirements of the business world. The Act was not intended to create another judicial type of forum with the attendant technical rules, delays, and complex procedures incident to a formal proceeding, but to avoid these problems by creation of an informal, simple procedure which would end the dispute with the prompt rendition of an award. Recourse to the courts was provided, but only in a rather summary proceeding and intentionally limited to functions far more narrow than the courts were used to exercising.

In the House Report, it is stated,

> "Arbitration agreements are *purely matters of contract*, and the effect of the bill is simply to *make the contracting party live up to his agreement.*" HR Rep. No. 96, 68th Cong., 1st Sess., 1 (1924). (Emphasis added.)

Mr. Julius Henry Cohen, draftsman for the American Bar Association, wrote of the evils to be corrected in a brief submitted to the Joint Committee, as follows:

> "The evils at which arbitration agreements in gen-

eral are directed are three in number. (1) The *long delay* usually incident to a proceeding at law, in equity or in admiralty, especially in recent years in centers of commercial activity, where there has arisen great congestion of the court calendars. This delay arises not only from congestion of the calendars, which necessitates each case awaiting its turn for consideration, but also frequently from preliminary motions and other steps taken by litigants, appeals therefrom, which delay consideration of the merits, *and appeals from decisions upon the merits which commonly follow the decision of any case of real importance.* (2) *The expense of litigation.* (3) *The failure, through litigation, to reach a decision regarded as just when measured by the standards of the business world.* This failure may result either because the courts necessarily apply general rules which do not always fit a specific case, and because, in the ordinary jury trial, the parties do not have the benefit of the judgment of persons familiar with the peculiarities of the given controversy." Joint Hearings before the Subcommittee on the Judiciary, 68th Cong., 1st Sess., 7 (1924) at 34-35.

It is to be noted from Mr. Cohen's brief that one of the areas in which the Act was intended to cure delay was in appeals from decisions on the merits. Similar statements of intent to avoid the delays and expense of litigation were often repeated by the sponsors of the legislation and its other supporters, including the then Secretary of Commerce, Mr. Herbert Hoover.[18]

The policy of obtaining a speedy, binding and inexpensive resolution of disputes required a high degree of

[18]House Report and Joint Committee Report, *supra;* also S. Rep. No. 536, 68th Cong., 1st Sess., 3 (1924) and Hearings on S. 4213 and S. 4214, before the Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess., 2 (1923).

finality of the awards, or otherwise arbitration would become just another level to add to the existing tiers of the judicial structure and perhaps would create even more delays. Consequently the Act provided for a most limited form of review, an award being subject to vacatur or modification only upon those grounds specifically listed in Section 10. Mr. Cohen, the draftsman, interpreted these provisions of the bill as follows:

> "The motion to enforce may be opposed or an independent motion may be made to vacate, modify, or correct the award. *There is no opportunity for vacation upon a technical ground. The courts are bound to accept and enforce the award of the arbitrators unless there is in it a defect so inherently vicious that, as a matter of common morality, it ought not to be enforced. This exists only when corruption, partiality, fraud or misconduct are present or when the arbitrators exceeded or imperfectly executed their powers or were influenced by other undue means—cases in which enforcement would obviously be unjust. There is no authority and no opportunity for the court, in connection with the award, to inject its own ideas of what the award should have been.*" Joint Hearings, *supra* at 36. (Emphasis added.)

In the strong and definite language of the author of the bill, a defect in an award must be "inherently vicious" before as a matter of "morality," not because of violation of some technical rule, the award will be set aside.[19]

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[19]These purposes were again expressed by Mr. Cohen, with co-author Kenneth Dayton, in *The New Federal Arbitration Law*, 12 Va. L. Rev. 265, at 272-273 (1926); see also *The United States Arbitration Law and Its Application*, 11 A.B.A.J. 153 (1925) (report from the Committee on Commerce, Trade and Commercial Law of the American Bar Association following passage of the bill the Association had sponsored).

Any other rule would frustrate the major purpose of using arbitration – to avoid litigation.[20]

The Supreme Court has recognized the basic purposes of parties in their resort to arbitration. In *Wilko v. Swan, supra,* the Court stated,

> "The United States Arbitration Act establishes by statute the *desirability of arbitration as an alternative to the complications of litigation.* The reports of both Houses on that Act stress the *need for avoiding the delay and expense of litigation,* and practice under its terms raises hope for its usefulness both in controversies based on statutes or on standards otherwise created." 346 U.S. 427, 431-432. (Emphasis added.)

In *Prima Paint v. Flood & Conklin,* 388 U.S. 395, 87

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[20]The reasons for limited judicial review of awards are well and succinctly stated in Note, *Judicial Review of Arbitration Awards on the Merits,* 63 Harv. L. Rev. 681 (1950),

> ". . . a policy of non-review will implement what is generally considered to be the parties' main purpose in resorting to arbitration—to avoid litigation. Litigation tends to frustrate the hopes generally entertained by parties who submit to arbitration, namely, that the arbitration process would be relatively cheap and quick; that the dispute would be judged by men familiar with the practical intricacies of their type of relationship and disposed to give weight to nonlegal factors like businss ethics; and that the hearing, conducted in a less formal and combative atmosphere, would have a less disruptive effect on the parties' possibly continuous relationship. A practice of liberal review thus tends to increase the workload of the courts: not only will cases be transferred from arbitral to judicial tribunals, but also the parties will tend to resort to the courts originally because they will wish to avoid the 'extra step' of an arbitration proceeding." *Id.* at 681-682.

S.Ct. 1801, 18 L.Ed.2d 1270 (1967) the Court again had occasion to state the congressional purposes of the Act with regard to the relationship of arbitration and litigation and strongly enforced these purposes by holding that the issue of fraud in the inducement of a contract is a question for arbitration under the contract and is not a matter to be determined in advance by a court. The Court stated,

> "In so concluding, we not only honor the plain meaning of the statute but also *the unmistakably clear congressional purpose that the arbitration procedure,* when selected by the parties to a contract, *be speedy and not subject to delay and obstruction in the courts.*" 388 U.S. 395, 404. (Emphasis added.)

It is earnestly submitted by Respondents that an overturning and annulment of the award and the thousands of hours of work required to arbitrate and resolve the complex disputes in the case at bar would completely frustrate the major purpose of arbitration, namely, to provide a quick, final and inexpensive form of relief. To hold that there is sufficient ground for vacatur would establish an unnnecessary rule by which losing parties in arbitration proceedings could challenge the awards and avoid their confirmance until appeals become exhausted years later. In this case it will be at least five years since the rendition of the award before a final decision is reached as to its validity. A. 30-35.

Any such unwarranted rule would have to be of a technical, theoretical and "legalistic" nature, clearly contravening the informal nature of arbitration and the purposes of the Federal Arbitration Act. Such a rule would take little or no account of the effects, or lack thereof, of business relationships on the arbitration because Peti-

tioner's admissions concerning Mr. Capacete's past business relations conclusively establish they had no effect on the proceedings or the award. Such a rule would have to impose a duty on the arbitrator, and/or the parties, to volunteer information concerning past, unrelated and remote business relations, although such information has not been requested by anyone, and even though arbitration is a matter of contract, and the contracting parties in no way agreed to require such information to be volunteered. The two business corporations involved could have so contracted, but they each elected not to exact this additional contractual duty of each other or to establish it as a part of their contract arbitration rules. Surely, to impose judicially without legislative mandate such an absolute procedural duty would be to create a technical form, rather than honor the practical circumstances which exist in commercial arbitration, at the greatest of costs to the parties and in denial of the purposes of arbitration, vacatur by subsequent litigation for technical, procedural considerations. Even though arbitration may be amicable, it is still an adversary proceeding, each party trying to make certain the arbitrators selected are impartial and free to be convinced that his position is right and he should in all fairness prevail. In this situation a party, and even arbitrators, are not likely, and are not required, to examine all of their past relationships, experiences, and contacts, and those of their family and affiliates, to see and judge if there is not some information to volunteer; instead the subconscious, or conscious, assumption is that if a party wants to know if ever there has been a relationship of some kind, the question will be *asked*.

Absent such inquiry it is natural to assume the parties

have otherwise decided the arbitrator has the moral and technical abilities to be fair in his decision and thus do not inquire or object to the arbitrator's deciding the dispute. Consequently, there is practical, functional, reasonable and legal consent which binds and estops the losing party from silently waiting until losing before objection. It would be immoral, inequitable and wrong to allow a losing party to have enjoyed the possibility of winning and binding "his opponent," while he participates in the arbitration without making such easy inquiry, but secretly waits to repudiate and reject the arbitrators if he dislikes their decision. Fair play and law should not tolerate such "one-way" and non-mutual "my way or no way" tactics. To create such a rule would be to construct a trap for not only the unwary but most of those seeking to arbitrate under the Act who naturally presume the process to be informal and without such procedural hazards as one would possibly anticipate and protect oneself against in litigation where one has adequate notice of such technical rules.

### 3. Petitioner Waived any Right it May Have Had to Object to the Appointment of Mr. Capacete as an Arbitrator.

Even if it is assumed for purposes of argument that the business relationship between Mr. Capacete and Samford could obviate the award, which argument Samford denies, Petitioner nevertheless waived any and all objections it may have had to Mr. Capacete as an arbitrator. By reason of this waiver by Petitioner, and on this ground alone, the District Court and Circuit Court were justified in confirming the award.

*American Jurisprudence 2d* states the general rule with regard to waiving an objection on the basis of bias or partiality of an arbitrator, as follows:

> "Though an arbitrator appears to be biased because of relationship to one of the parties or for other reasons, an action to stay the arbitration or to disqualify the arbitrator or to set aside an award on the basis of the bias or prejudice will not be successful if the moving party knew, at the time the agreement was made, of the facts alleged to constitute the bias or prejudice, or failed to object at the earliest opportunity in the arbitration proceedings." 5 Am.Jur.2d *Arbitration and Award,* § 101.

Furthermore, if the objecting party had knowledge of facts or circumstances which suggested or possibly indicated or inferred the possibility of the existence of some past or present business relationship between an arbitrator and the opposing party, it is incumbent on the objecting party to make an adequate and proper investigation and inquiry of the arbitrator or opposing party; otherwise the unsuccessful litigant who later objects will be deemed to have consented to the selection of that arbitrator or waived the right to object after arbitrating and

awaiting the outcome and award before so inquiring or objecting. This is logical, reasonable, fair, and consistent with other basic and fundamental legal and practical concepts and practices of constructive or imputed knowledge, waiver, and implied consent.

In *Ilios Shipping, supra,* the objecting party knew prior to the arbitration that Mr. Ellison, the arbitrator, was in the insurance business and associated with a particular agency, and the party was held bound by the information he could have discovered upon inquiry concerning business relationships, namely that the arbitrator's insurance agency had had business relationships with an agent of the other party in the arbitration proceedings. The court stated in its holding,

> "However, even more important is the fact disclosed in the moving papers that respondent knew before the arbitration started that Mr. Ellison *was in the insurance business* and *associated with John F. Curry Agency, Inc. and that respondent could have inquired concerning the business relationship of his firm to any party interested in the arbitration. Where a party has knowledge of facts possibly indicating bias or partiality on the part of an arbitrator he cannot remain silent and later object to the award of the arbitrators on that ground. His silence constitutes a waiver of the objection.* See *San Carlo Opera Co. v. Conley,* D.C.S.D.N.Y. 1946, 72 F.Supp. 825, 833, affirmed 2 Cir., 1947, 163 F.2d 310." 148 F.Supp. 698, 700. (Emphasis added.)

Similarily in *Cross Properties, supra,* the court noted,

> "*The nature and magnitude of the real estate company* with which Spear [the arbitrator] was affiliated would make it most likely that at *one time or another there would be some contact with one of*

> *the largest department stores in the City of New York.*" 255 N.Y.S.2d 1014, 1016. (Emphasis added.)

In *Newburger v. Rose,* 240 N.Y.S. 436 (App. Div. 1930), aff'd 254 N.Y. 546 the court stated that the moving party waived its right to object to an arbitrator, holding,

> ". . . The right to take advantage . . . [of the claim of disqualification] was waived because, with knowledge of the facts, the respondent failed to make the timely objection . . . *It has not been shown that any facts bearing on his qualifications were withheld or were of such a nature that appellants could not, without reasonable diligence, have ascertained them before the arbitration.*" 240 N.Y.S. 436, 438-439. (Emphasis added.)

The court noted, in response to the objection that the arbitrator was biased because of his being a stockbroker, that this was information which "could have been discovered by reference to the telephone directory" (240 N.Y.S. 436, 438), implying that the party therefore had constructive notice, if not actual notice, and consequently the objection was waived.

There can be no question but that upon reasonable inquiry Petitioner could have easily learned of the business transactions between Foundation Engineering Company and Samford. It is indeed even difficult to imagine that Petitioner, a large and active painting subcontractor in Puerto Rico, having painting contracts with Samford alone totalling over $350,000.00, did not have actual knowledge that the most prominent or at least one of the several most prominent engineers, Mr. Capacete, and the engineering and testing firm in Puerto Rico, Foundation Engineering Company, had performed routine

testing services for Samford, as a large general contractor in Puerto Rico which had over $9,000,000.00 in construction work to be performed on the small Island of Puerto Rico.

Here Petitioner does not even deny having at least the equivalent information that the protesting parties had in *Ilios Shipping, Cross Properties* and *Newburger v. Rose*. The attorney for Petitioner, Mr. Romero, was a close personal friend of Mr. Capacete, as had been Mr. Romero's father, who was also an engineer. A. 146. It has not been, and cannot be, denied by Petitioner that it knew, as an active subcontractor on five separate large projects of Samford, that Samford was one of the principal active construction companies in Puerto Rico at the time preceding and during this controversy. A. 30-31. Mr. Romero knew of the position of Mr. Capacete in the field of engineering and of Mr. Capacete's type of business. A. 146. In spite of this knowledge of the significance of the construction-related businesses of Mr. Capacete and Samford and Petitioner on the Island of Puerto Rico, counsel for Petitioner did not perform the easy task of making inquiry of his friend, Mr. Capacete, concerning whether there had been any previous business relationships with Samford (A. 146), even though he personally talked to Mr. Capacete about possible qualified arbitrators for this very same arbitration proceeding (A. 145). Nor was inquiry made of Respondents or their attorneys.

In light of this unexplained, unusual, and inexcusable failure to make ordinary simple, and easy inquiry, surely Petitioner cannot morally, legally or equitably now be heard to argue that it did not waive its right to object to Mr. Capacete, with whom Petitioner talked and con-

ferred when arbitrators were being selected. As in *Ilios Shipping*, Petitioner's continued silence regarding Mr. Capacete until after it learned of the unfavorable award, although it had knowledge of these circumstances that would cause one reasonably to infer the possibility of business relations, must be held to constitute a waiver of any objection.

**4. Public Policy Demands that the Award be Confirmed.**

**The Practical, Contractual Rule**

The policy which strongly supports the validity and finality of arbitration awards is probably the single most important policy applicable to arbitration following enactment of the Federal Arbitration Act and the various state statutes. This policy has been often expressly recognized by this Court. See, *e.g., Prima Paint Corp. v. Flood & Conklin, supra,* and *Wilko v. Swan, supra.* The legislation had been required to reverse the common law rule which had viewed arbitration as usurping or intruding upon judicial jurisdiction. However, the demands of commercial trade and needs of industrial activity required a new method of deciding commercial disputes to supplement resort to the courts, if the contracting parties desired and agreed upon such method of resolving their differences in a binding way. A remedy was desired which would avoid the often critized delay and expense of litigation and, perhaps just as importantly, a remedy which could preserve the business relationships of parties by allowing for a more quick, final, and amicable resolution of the issues than was possible in the courts. This also would often be a means of resolving a dispute without a severance of the contractual relation. The creation of the remedy of arbitration may be likened to the creation of the equity court—in both instances the existing legal remedies had been found inadequate to meet the increasingly more complex needs of society and the new remedy of arbitration—voluntarily entered into by consenting adults, firms, and corporations—thus was created by necessity and the desires

of the business community. It is on the basis of this background that this Court must rule.[21]

Arbitration is, of course, inherently and simply a *contractual* remedy — parties to contracts adopt it as an agreed means of resolving their own disputes in lieu of resort to the courts. The cases reflect all types and methods of arbitration, use of a single arbitrator or a board of arbitrators, arbitrators selected sometimes by one or more of the parties, sometimes by a trade association, by architects, or the American Arbitration Association or others. Various different practices are followed in arbitration, some formal, much like a judicial proceeding, some wholly informal, very often without the use of attorneys.[22] A fundamental value of arbitration is reflected by this diversity and freedom of practice — parties are left free to decide how they desire to or believe they may best resolve their disputes, and then to incorporate the procedure they desire in their contracts.

It is submitted that for this Court to do anything other than confirm the award in this case would be to seriously undermine arbitration as a reliable remedy. To vacate the award, the Court would have to choose one of two possible grounds: (1) that there is a non-waivable (by the contracting parties) absolute "duty" (though not stated in the contract) of an arbitrator and/or a party to volunteer unsolicited information about past and remote business relationships concluded a con-

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[21]See generally, DOMKE, THE LAW AND PRACTICE OF COMMERCIAL ARBITRATIONS (1968), at 1-29; and Sarpy, *Arbitration as a Means of Reducing Court Congestion*, XLI Notre Dame Law. 182 (1965).

[22]Kellor ARBITRATION AND THE LEGAL PROFESSION (Pamphlet, Am. Arb. Assn., 1952 (?) ).

siderable time prior to the arbitration, even though the contract procedure agreed to required no such disclosure and such past relationships admittedly had no effect on the arbitration, and that failure to comply with such not-agreed-to "duty" is "evident partiality" per se, or (2) that on review of the facts of this case, there was "evident partiality," although both the District Court and the Court of Appeals expressly found to the contrary, and again irrespective of the contract procedure agreed to by the parties involved and the fact that such relationship admittedly had no effect on the arbitration. The creation of either rule would destroy confidence in the finality of arbitration awards, and consequently, in the use of arbitration as a remedy. It would also unjustly destroy the work and efforts of the parties and arbitrators that produced the award which the Federal District Court found to be "fair and impartial."

In the first place, such a rule would be totally technical in nature, imposing a severe result, vacatur, even though the complaining party many times admitted and stipulated in open Federal District Court in the suit challenging the award that the relationship had no effect on the arbitrator involved. The rule would require arbitrators and/or parties to arbitrations to voluntarily do certain things not expressly provided for or required by statute, or by contract, such things as conducting an examination of all the relationships, contracts and dealings they or their family, company, or affiliates had had at some time personally or otherwise to determine if a relationship of some kind at some time existed, and if one of some unstated and uncertain kind were found to have existed at some un-

defined time, then to volunteer such information although it was not requested. Such a technical, and indefinite and undefinable rule has no place in a procedure which is supposedly free from such pitfalls, free from rules that only possibly attorneys would be aware of (if even they) when often attorneys are not used at all.[23] If the duty is placed on the arbitrator to volunteer on his own initiative that which no one requires or asks, since often the arbitrator will be a layman and will have no legal advisor, is there then also to be imposed a duty on a party who himself may or may not be represented by counsel to advise and instruct the arbitrator to volunteer such information to the other party? Does he do this privately or jointly with the other party? If privately, is it "fatal" not to disclose this relationship or contact?

There simply is no means in such a procedure to provide notice to participants who are consenting contracting parties of a rule that most certainly runs contrary to the assumptions of parties in adversary proceedings. One is not normally thought obliged to aid his opponent in the assertion or protection of rights where it is presumed the opponent is doing all that the opponent desires or feels is necessary in prosecution of his case. A party is not obligated to be advocate and adviser for both sides of a dispute. In short, if a party thinks information of a certain character is required, he is expected to reasonably and properly seek that information; absent an express requirement to provide the information, it would be contrary to customs and natural expectations to assume it would be unilaterally volun-

[23]See note 22, *supra.*

teered. It is respectfully submitted that the creation of any such rule should be only by clear and express legislative action, especially in view of the fact that not only is there a total absence of any evidence that Congress intended to impose such a technical rule in the Federal Arbitration Act, but the legislative history is replete with statements of the purpose of overcoming similar technical rules found in litigation.

To confirm the award would leave arbitration a matter of contract, made enforceable by statute and subject only to the express requirements of statute, including the requirement that there must not be "evident partiality," namely *actual* partiality. To require an absence of actual partiality would be a practical rule that all involved in arbitration would acknowledge as only reasonable and expected to be the rule that would apply. Such a rule would not be at variance with the rules, policies and practices of trade associations or the American Arbitration Association concerning disclosure, but would provide flexibility by allowing for adoption of such additional procedures and rules by contract as a part of the agreement to arbitrate as the contracting parties desired. The contracting parties could (as they may do now) require the volunteering of information about relationships, or, like the practice of the American Arbitration Association[24], the association itself could assume the responsibility for making inquiry of arbitrators concerning relationships. Confidence in the finality of awards would be justified so long as the contract arbitration pro-

[24] *The "Hazards" of Commercial Arbitration* (Editorial), 17 Arb. J. (n.s.) 65-66, 111-112 (quoting instructions from form sent by the Association to nominated arbitrators).

cedures were followed and there was no actual wrongdoing by an arbitrator.

**Judges and Arbitrators**

The argument has been suggested that arbitrators should be held to the same or similar standards as judges. R. XVI, 156 (4-11a); Br. of Pet., p. 31. Some few states require disqualification of judges, under certain conditions for the sake of appearances although the judge could act without bias. However, there are basic differences between the mandatory response to a court's summons and arbitration voluntarily agreed to as a method of resolving contract disputes. There is little reason to impose the same strictures on arbitrators. Judges are public officials holding office for various terms, sometimes for life; strong public interest requires even the avoidance of appearance of conflict of interest in order to promote confidence of the public in the individual judges and in the judicial system; the parties who come before judges have little choice in who will hear their case; it is most definitely awkward and difficult, if not at times impossible, for a party in judicial proceedings to inquire of the judges' relationships with another party; a judge, being professionally educated for and with experience in his position, can be expected to have complete knowledge of all requirements concerning his conduct, however technical those requirements may be.

On the other hand, an arbitrator serves for a short period of time to resolve a single dispute; the parties to an arbitration have the right to select their own arbitrator and a right to inquire and object, on valid grounds, to who the other arbitrators will be, and thus it can be said the parties have both control and private responsibil-

ity over who will decide the dispute; since the parties are doing the selecting, it is easy and to be expected for a party to make inquiry of the other party or the arbitrators concerning business relations, if such information is desired; unlike a judge, an arbitrator is not trained in the responsibilities and duties of being an arbitrator, but in fact may act as an arbitrator only on a single occasion with no prior experience or instruction, having only the agreement to arbitrate and possibly a statement of the questions or disputes he is to decide.

All of these differences require that arbitrators not be subjected to the same restrictions as judges. The lack of similarity between an arbitrator and a judge has been observed by the late Professor Wesley Sturges in discussing whether statutes disqualifying judges from serving where certain relationships exist should also be applied to arbitrators. Sturges discusses a case where an arbitrator was held not subject to the Alabama statute disqualifying a judge from serving where there was a familial relationship to one of the parties[25], and concludes that such statutes do not apply to arbitrators. Sturges at 369. Likewise, no similar restrictions should

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[25]COMMERCIAL ARBITRATIONS AND AWARDS (1930). Sturges quotes from *Davis v. Forshee*, 34 Ala. 107 (1859),

> "Parties may be drawn against their consent before judges, chancellors, county commissioners and justices of the peace; and usually they have little or no choice in the matter. They are officers appointed by the law, and suitors must submit to their orders. Arbitration, in this state, is never compulsory. Parties voluntarily elect this mode of adjustment, and appoint their own arbitrators. We know no reason why persons related to suitors within the fourth degree, may not, if chosen, act as arbitrators, and make a binding award." Sturges at 369.

be judicially created to formalize and limit the selection of arbitrators by the contracting parties.

Even if Professor Capacete *were* held to the strict standards imposed on a federal judge, he would still not have such an interest here as would disqualify him, for a judge is not disqualified by an interest which is past, not present;[26] nor is a federal judge whose interest is insubstantial required to disqualify himself.[27] Here, Professor Capacete had no interest in the outcome of the litigation and the casual, unrelated and insubstantial business relationships which had occurred had ceased a year or more earlier. Furthermore, the professional fees paid by Respondent Samford were only a small fraction of 1% of the incomes of the firms in which he had an interest, an amount which is obviously quite insubstantial.

**Jurors and Arbitrators**

Another comparison between litigation ad arbitration supports the conclusion that it is incumbent on a party to make inquiry about relationships if he is to make objections. The common practice in jury trials is to select jurors by *voir dire* examination, prospective jurors being dismissed for cause if a relationship is found upon examination by a party. It is necessary, however, that the party who wants to object to make or request the court to make the inquiry; otherwise, the party will be deemed to have conclusively waived any such objection by failing to make inquiry and objection before the prospective

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[26]30A Am.Jur., *Judges*, §102.

[27]28 USCA § 455; See *Lampert v. Hollis Music*, 105 F.Supp. 3, 5 (E.D.N.Y. 1952).

juror is allowed to become a member of the jury panel. It is not prejudicial to a party to make such inquiry and it is expected and required, or there is deemed to be irrebuttable consent or waiver.[28]

The policy in favor of finality, present even in litigation as an arbitration, requires that the doctrine of waiver apply when a party has failed to make relevant and prudent examination. It is no more an unusual proposition to expect – and the law require – parties in arbitrations to make the same such inquiry of prospective arbitrators, and even of the opposing parties (being an additional source of information) in order to entitle such parties to make objections or be forever barred by allowing the arbitrator to decide the dispute without having first so inquired.

**Contracting Officers and Arbitrators**

Comparison to a similar means of resolution of disputes reveals that there is nothing unreasonable, unfair or harsh in a rule which merely causes parties to comply with their own contractual agreement to arbitrate, and if the agreement does not call for or require any such disclosure, not to impose upon the parties such technical procedures by judicial construction, when if such had been desired it could easily have been included in the contract or, if not, easy inquiry made when the arbitrators were being selected.

In Goverment construction contracts, the disputes procedure has been likened to an "arbitral" process. *United States v. Wunderlich*, 342 U. S. 98, 72 S.Ct. 154, 96 L.ed. 113 (1951). Yet in this procedure the contracting officer who is an employee of the Government – one of the

[28]50 C.J.S. *Juries* §251. See *Knickerbocker Textile Corp. v. Leifer Mfg. Corp., supra*, 105 N.Y.S.2d 200, 201.

parties – and is the person principally responsible for performance of the Government's obligation under the contract is made also the decision-maker, or arbiter, of disputes. Here one of the party's own agents and employees, the Government's, is also the *sole* "arbitrator." The rationale supporting the fairness of this procedure is that this is what the parties agreed to in their contract. The judicial review of the determinations of disputes reached in this "arbitration" procedure of the Government agency was limited by this Court to the sole issue of whether the Government representative was guilty of *actually* fraudulent conduct. This reflects Federal law favoring strongly the policy of finality. *United States v. Wunderlich, supra.* After the passage of the Wunderlich Act, 41 USCA § 321-322, this Court continued a policy of supporting finality of such administrative "arbitration" decisions rendered under the contracts disputes clause by holding a party was not entitled to a de novo hearing in the Court of Claims on challenges under the Wunderlich Act. *United States v. Bianchi & Co.*, 373 U.S. 709, 83 S.Ct. 1409, 10 L.ed.2d 652 (1963).

In comparison to the contractual obligation to follow the procedure of the disputes clause, it cannot be said that there is anything less fair, moral, reasonable, equitable or practical in a rule which allows parties to select, by contract, a mode of arbitration procedure which is informal in nature, does not expressly or by adoption of rules of associations require the volunteering of information concerning relationships otherwise not elicited, and makes it incumbent on a party to ask for such information or otherwise be bound by the results of the arbitration, absent *actual* partiality, bias or fraud. The parties' agreement on an informal procedure places

them on equal terms under the agreement to object to arbitrators. However, the disputes procedure under Federal Government contracts quite clearly leaves the Government and a private party on somewhat less than equal terms where the same person who is the employee and agent for the Government (with the Government reserving the right to unilaterally replace him with a successor of the Government's own choosing) is also the judge or arbiter of disputes between the parties.[29] Is there any more reason to infer that in the case at bar Professor Capacete, who had only remote, unrelated, and very limited contacts occurring a year or more before the arbitration, was any less qualified to serve as a decision-maker under the agreement to arbitrate than a contracting officer who is directly, currently and actively involved as agent and employee of one party under a Government contract? It is submitted that, even more so than in the case of the contracting officer, the agreement as to resolution of disputes by arbitration should control, and since there was no agreement for the arbitrators or the parties to unilaterally volunteer information concerning past relationships, none should be judicially imposed, especially since such a conclusion would be entirely contrary to the understandings, assumptions and normal practices of parties in such adversary proceedings.

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[29]See criticism of this procedure, Braucher, *Arbitration Under Government Contracts,* 17 Law and Contemporary Problems 471 (1952) at 486-500, and Note, *Arbitration and Government Contracts,* 50 Yale L. Journ. 458, at 460-461, both articles suggesting that a form of arbitration by third parties would be a better remedy than under the "disputes" clause in Government construction contracts.

**Consequences of this Court's Decision**

To confirm the award will not impair any of the safeguards necessary to preserve the integrity of commercial arbitration as a useful and advantageous remedy voluntarily employed by contracting parties in lieu of litigation. The basic essential to arbitration insofar as the question of the relationships of the arbitrators is concerned is that there must not be *actual* partiality, bias or fraud. The rule that vacatur would result when *actual* wrongdoing is present would remain undisturbed because *actual* partiality is not an issue, but has been admitted by Petitioner not to be present, and the District Court and the Court of Appeals expressly found there was no partiality in fact and both courts commented that the evidence was clearly to the contrary (A. 185, 194).

With regard to any right which may be found to exist to object to an arbitrator because of the mere existence of some past relationship without reaching the issue of the effect of such relationship, it is respectfully submitted that for all of the foregoing policy reasons and on the basis of the relevant authorities discussed above, it is an obviously adequate protection of such right to cause the party who would or could object to make reasonable inquiry *before* arbitration and make any objections known at that time, rather than participate in the proceeding and await the award and then in retrospect seek to determine if there is some past relationship or defect which can be found to overturn an unfavorable award.

Any other rule would make arbitration unnecessarily hazardous, uncertain and impractical, placing obligations on the arbitrators and/or the parties of which they may

well not be aware or know how to define and perform since such a rule would be contrary to what one would naturally and customarily expect the obligation to be, namely not to volunteer unsolicited and undefined information, but to respond truthfully if inquiry is made. Such a technical rule would tend to foster and encourage not making inquiry until after the award, allowing a party to learn of the result before being obliged to determine if he had any objections to who he allowed to hear and decide the controversy, consequently causing an unnecessary waste of time, money and effort. Such a result would unfairly, unreasonably, and wrongfully reward indolence, carelessness, or trickery, while destroying the purpose and effectiveness of commercial arbitration.

For the Court to formulate a rule that calls for a new and independent review of the factual issues regarding the extent, nature, effect, and remoteness of past business relations between an arbitrator and a party to determine whether the relationship constituted "evident partiality" without any recognition of any responsibility of a party to reasonably inquire about such relations and irrespective of the admissions of the objecting party that there was no *actual* partiality or adverse effect on the award, it is respectfully submitted, would be to create an undesirable and unsound standard of appellate review; and most definitely so if in a third judicial review of the same facts in this case it is finally decided that there was "evident partiality," though the objecting party admitted the arbitrator was not guilty of any fraud or any other improper conduct. Such a rule would promote the making of every effort through use of the appeals procedure to find a court sympathetic to the position of the

losing party in arbitration proceedings, although no challenge is made of actual partiality or of effect of the relationship, a result that would virtually destroy confidence in the finality of proceedings where persons in the same or similar or related businesses are commonly used because of their special knowledge, experience, and skills and are likely to have had such past business relationships, just as was the case with Professor Capacete. Most clearly Congress did not intend to promote such use of the appeals procedure in Section 10 of the Federal Arbitration Act. Instead the standards of review of awards were obviously intended by Congress to be very conservative and limited, in the words of the draftsman, to the *"inherently vicious"* deviations from what is moral and fair. Joint Hearings, *supra*, at 36. (Emphasis added.)

Respondents therefore respectfully submit, (1) that the Court should not adopt a standard of review that requires a court to enter into a new and independent evaluation of the details and disputed circumstances of past business relationships where there is admittedly no actual partiality or wrongdoing on the part of the arbitrator and, consequently, no allegation that the award has been in any way affected, and (2) that if the Court nevertheless adopts a rule requiring a judicial review of the facts under the circumstances of the case at bar, the Court should confirm the award on the basis that there were adequate grounds and evidence for the District Court to conclude that there was no "evident partiality" on the part of Mr. Capacete for the reason that the trial court could properly conclude that the relationship was past, vague, remote, uncertain and insubstantial, and that the Court cannot find, as a matter of law,

that the decision of the District Court, as the trier of the facts, was erroneous.

In this case, the District Court viewed and had the opportunity to consider "all the evidence that was introduced" in the arbitration trial (A. 97) and to observe and hear the sworn testimony of the three arbitrators, as well as the testimony of Mr. Romero (A. 178), and the court reporter who recorded the arbitration proceedings on tape recorder, relevant portions of which were transcribed and submitted to the District Court as evidence. Also, the District Court observed and heard the attorneys of both parties make judicial admissions, concessions, and stipulations regarding the very issue now on appeal. By reason of the presumptions favoring the validity and correctness of a trial court's judgment and the reasons the appellate courts do not overturn the decisions of triers of fact who had the opportunity to evaluate credibility and analyze and observe the details, demeanor, and dynamics of the witnesses and the litigants, the arbitration award should be sustained and upheld by affirming the decision of the District Court that "the record shows that the arbitrators conducted fair, impartial hearings; that they reached a proper determination of the issues before them" (A. 185) and the decision of the Court of Appeals that "the court was well warranted in finding that there was no prejudice or bias in fact manifested in the course of the proceedings. Indeed, there was considerable evidence which negatived it" (A. 194).

Judge Learned Hand, in an otherwise neutral statement concerning the virtues of arbitration, succinctly summarized the important policies to be considered in

reviewing awards and, consequently, in developing the standards of review,

> "Arbitration may or may not be a desirable substitute for trials in courts; as to that the parties must decide in each instance. *But when they have adopted it, they must be content with its informalities; they may not hedge it about with those procedural limitations which it is precisely its purpose to avoid. They must content themselves with looser approximations to the enforcement of their rights than those that the law accords them, when they resort to its machinery.*" *American Almond Prod. Co. v. Consolidated Pecan S. Co.*, 144 F.2d 448, 451 (2nd Cir. 1944). (Emphasis added.)

**5. Petitioner's Self-Impeachment and Petitioner's Abuses of the Arbitration Process Totally Discredit and Nullify Petitioner's Attack on the Award.**

In opening argument to the District Court in rebuttal of the unfounded arguments of counsel for Petitioner, counsel for Respondents stated:

> "I request as a privilege, the opportunity to . . . reply . . . . [to the] . . . implied accusation of impropriety or doubtful conduct. We desire to present sworn proof . . . the Court will know who is proper and who is improper, if anyone . . . We have some proof we would like to introduce. We deny categorically and completely not only what was expressly stated to this Court, but what was implied insofar as it reflected any impropriety with the selection of the arbitrators. Secondly, we believe we can establish that Commonwealth Coatings knew or should have known that Mr. Capacete had previously done some minor work." A. 80-81.

Respondents requested this privilege in the District Court. The incorrect and unwarranted accusations of the Petitioner have become increasingly serious, surprising and scandalous with each appeal.

"Fighting" finite men frequently fool themselves. However, as judges and others learn the facts not only about the fight but primarily about the "fighters," the finite men, they are seldom fooled. In an effort to respectfully assist the Court to unwrap the generalities of easy, incorrect and harsh allegations and discover the hard kernels of historical truths regarding who has wronged another and betrayed himself, a short summary of the history of these litigating parties is stated.

## Petitioner Breached The Letter and Spirit of Its Agreements

The two corporations, both experienced contractors, in 1960 and 1961, executed five subcontracts for $351,938.00 worth of painting. A. 33.

Recognizing the need for prompt and binding settlement of disputes on construction contracts, where great damages can result from delay and disruption, these two contractors in their subcontracts agreed that if any dispute arose, each of them would immediately select an arbitrator and those two would select a third arbitrator and,

> "*The written decision of any two of this Board shall be final and binding* on both parties hereto . . . Provided, nothing contained herein shall excuse subcontractor from *completion of the work* in the manner provided in this contract nor shall the pendency of any dispute or arbitration proceeding excuse any delay, deficiency, default or noncompliance therewith." A. 47. (Emphasis added.)

Notwithstanding this contractual obligation to resolve disputes promptly by arbitration with no disruption of the work, Petitioner after being paid $209,502.49 (A. 34) in June and July, 1962, wrongfully abandoned all of its painting work without first demanding arbitration. A. 31, 34. Respondent Samford, immediately declared the painting subcontractor in default, demanded Petitioner resume work and resolve all disputes by arbitration. A. 31. Petitioner refused to complete its work, but did thereafter likewise demand arbitration (A. 31) and both parties agreed "all disputes, legal and factual, involving all five subcontracts" (A. 32) would be decided by a single arbitration board.

Petitioner next wrongfully breached the spirit and substance of this ratification of its earlier contractual obligation to resolve disputes by arbitration by filing two lawsuits in the Federal Court in Puerto Rico against Respondent Samford's sureties. The District Court stayed this litigation until the arbitration proceedings mutually demanded by the parties had been completed. R. I, 12; II, 60. Contrary to the clear contract language and the written ratification, made after abandonment of the work, to arbitrate their disputes, Petitioner resisted the stay, *"contending that the arbitration was not required,* but the Court stayed the lawsuits and recognized the arbitration proceedings mutually demanded and commenced. . . ." A. 32. (Emphasis added.)

**The Arbitrators, The Parties and Mr. Capacete**

The November 12, 1963 arbitration award expressly found and adjudicated:

> "Thereafter, this Board of Arbitration was constituted, composed of a full panel, including Dwight L. Chapman, appointed by Samford; and Hector Martinez Munoz, appointed by Commonwealth; and *Jose L. Capacete, the remaining and third arbitrator agreed upon by both parties and their appointed arbitrators.*
>
> *"The Board determined that its members have been duly and lawfully appointed and agreed upon to serve as arbitrators.* The Board further finds that the parties have agreed to cause all disputes, legal and factual, involving all five subcontracts to be decided by a consolidated and single arbitration board. . ." A. 32. (Emphasis added.)

**Ten Days of Testimony**

"The Board . . . conducted hearings and heard testimony for some ten days and heard final arguments of counsel for both parties on Tuesday, September 3, 1963. . . .

"Additionally, both parties agreed to submit briefs, with the right to respond to the briefs of the other, and with both entitled to submit a proposed award to the Board.

"The Board before making any one of these findings has fully considered and studied all of the evidence, each party's statement of issues, stipulations, and briefs, proposed award, and contentions of the parties, as well as the details of all of the many claims, counter-claims and all of the legal and factual disputes and questions existing between the parties regarding each and all of the said five subcontracts and projects." A. 33.

**Breach of Stipulation to Exchange Documents**

"Mr. Romero: And we will meet at . . . eight o'clock. Mr. Currie: Eight o'clock. Thank you." Transcription of Sunday, September 1, 1963, Arbitration Proceeding, P. 8; described in R. XVI, 159 (4-11).

This transcript analysis and other evidence filed with the Court reveals the clear, specific, and exact understanding made between the attorneys, with their clients participating, to meet at eight o'clock the next morning to exchange data on financial and construction cost estimates, gallons of paint, labor, dollars and cents they both desired from each other, but mutually understood ". . . we don't want to give you ours until we get yours."

Notwithstanding this solemn agreement, it was totally

breached, and Petitioner failed to appear, failed to provide the audits, the accounts payable of Petitioner and other data that Respondent had requested from the beginning of the arbitration. With understandable disappointment, Respondent's attorney stated:

> ". . . Mr. Chairman, I would like to make a report to the Board. It was our understanding . . . that we would conclude this hearing today in this fashion that the parties were going to meet here at eight o'clock this morning, and all of the exhibits that were intended to be introduced were going to be available and put out on the table for the other party to examine and the documents that the other party had been requesting we had said for some time that at the beginning of the hearing that we wanted them to put their information in an envelope and have it available before we showed ours. *We have been asking for audits, accounts payable and other data.*
>
> "The Samford people at great inconvenience stayed up late last night and were up at six this morning and we were here at eight o'clock. At 9:05 Commonwealth appeared *without their attorney* and *had no data to present* to us other than a sheet or two of paper saying this was their estimate for (*sic* - or) the original bid or some such information. We had all of this evidence that we now have here and our exhibits which we are now indexing to make a list of what's in all of it on the table ready and available for their inspection so that we would not be delayed and ask to see their's — they had none.
>
> "And, *so there was a total failure of that effort.* . . ." R. VI, 139 (2-4). (Emphasis added.)

The breach of this stipulated "legal fair play" procedure participated in and condoned by the owners, officers and representatives of Petitioner is further ex-

plained in the District Court's record. See A. 158, 160, 162, 166, 167, 174, 175, 177-180.

The legal and moral implications of breaking this expressed understanding for mutual examination of the exhibits and documentary evidence becomes even more serious and condemning of Petitioner who later before the District Court wrongfully and incorrectly alleged it had not had an opportunity to examine Respondent's evidence and documents. A. 174, 175.

**Mr. Romero: So It's A Matter Of Credibility. A. 178.**

Petitioner's pleading alleged a denial of the opportunity to examine Respondent's documents and evidence. Petitioner's attorney, Mr. Romero, testified under oath regarding the lack of such opportunity and further testified that he objected to the introduction of this evidence. The District Court recognized the great significance of Petitioner's sworn pleadings and testimony which had complained that ". . . the Arbitration Board against your [Petitioner's] objections considered these documents without giving you an opportunity to look at those documents and examine them. . . ." A. 177.

The Court stated:

> "Of course the evidence is contradictory. You [Mr. Romero] have testified one way and Mr. Chapman and Mr. Capacete and Mr. Martinez have testified the other way. The only piece of evidence we had in order to clarify the situation was this tape recorder. This tape recorder may show that you objected and they did not pay any attention to your objection." A. 177-178.

To the Court, Mr. Romero responded:

> "I testified under oath as to my objections. . . . So it is a matter of credibility." A. 178.

Then followed:

"The Court: The only thing to determine that would be the tape recording. . . .

"Mr. Romero: As of this moment I believe it is a matter of credibility. . . .

"The Court: If there is any piece of evidence still to be investigated that would turn the tide one way or the other it is better to have that.

"Mr. Romero: Definitely." A. 178-179.

The tapes of the arbitration proceedings were transcribed. They definitely revealed ample opportunity for inspection. They definitely revealed no objections. They definitely revealed that the testimony of arbitrators Chapman, Capacete, and Martinez Munoz was correct and true. They definitely discredited and impeached the Petitioner's sworn pleadings and allegations and the Petitioner's attorney's sworn testimony. These transcripts demonstrate who was proper and who was improper. They demonstrate that the District Court's decision is based upon truth and valid evidence and that Petitioner lost and rightfully lost, the judicial proposition it made the District Court, "So it's a matter of credibility." A. 178.

**Fleeing From Cross Examination**

From ". . . the beginning of the hearing . . . we have been asking for [Petitioner's] audits, accounts payable and other data" to show Petitioner was not timely paying for the paint and materials on the projects as expressly required by the subcontracts. R. VI, 139 (3).

Petitioner had refused to supply this information during the hearing and even on the last day breached its

solemn stipulation to meet at eight o'clock in the morning to allow examination of such information.

Respondent renewed the request for the information after the failure of the eight o'clock agreed meeting. R. VI, 139 (4). However, Petitioner continued to refuse to provide the accounts payable and debts due by Petitioner to suppliers of paint and material for these projects, which until paid would constitute claims against Respondent Samford's surety payment bonds. Petitioner claimed that the unpaid items "of $60,000.00 in materials . . . have been secured by notes from United Marcus [*sic* - Painting] and Marcus Decorating" (R. VI, 139 (7-8)), other large painting firms owned respectively by Abraham N. Stein and Arnold Marcus.

Mr. Marcus is Petitioner's President (A. 53), while Mr. Stein is its Secretary (A. 61). The giving of such notes was consistent with the indemnification by these other companies, United Painting and Marcus Decorating, of the obligations of Petitioner, Commonwealth Coatings Corporation, and the indemnification given for Petitioner to obtain surety bonds guaranteeing the performance of its subcontract from Maryland Casualty Company (A. 68, 130, 182) on such a large total painting subcontractor's obligation as $351,938.00. (A. 33).

Respondent Samford had contended that it did not know what the notes covered, but that in any event such notes and Petitioner's bond did not constitute payment of the suppliers as required by the subcontracts. Respondent continued to seek the information that Petitioner refused to supply, as clearly demonstrated by the following arbitration transcript:

"Mr. Romero: . . . It also shows . . . that United

Painting and Marcus Decorating were behind this, and it also shows that they were behind it so that this will be no reason at all for Samford to claim that they were afraid of any problem with Commonwealth Painting, because it had these two companies behind it. And also, when we will submit the bonds that we will make available that there were *indemnity agreements on those payment bonds by United Painting and Marcus Decorating.*

"Mr. Currie: The testimony of Mr. Samford indicated that there was a note dated June, 1962. We do not know when it was given or the circumstances or the conditions of it dealing only with one of the accounts, not with reference to the others, and *we do not accept that that situation met the requirements of the subcontract.* The Board knows of our request — knows that on a Sunday *we anticipated receiving audits* that Sunday evening or in any event on the following Monday morning and *we had not received them.* Rather than delay the trial or get involved in an argument about that *we will proceed and hopefully get it on cross-examination,* and ask for such appropriate time extensions as may be warranted because of failure to comply with the commitments as we understood them." R. VI, 139 (8-10). (Emphasis added.)

This background makes more reprehensible Petitioner's "concealment" as revealed by the following statement made by Respondents' attorney to the District Court, which Petitioner never denied:

"We could complain in the same vein of things that the three principals of Commonwealth Coatings and two of the main owners from New York, *Mr. Stein and Mr. Marcus, during the last portion of the hearing, did not show up, and that prevented us from the right of further cross examination which*

*we wanted. When they voluntarily absented themselves from the hearing.*" A. 94. (Emphasis added.)

Petitioner's owners not only "did not show up" for the stipulated eight o'clock in the morning exchange of information and the evening hearing on the last day of the arbitration, which prevented Respondent's "right of further cross-examination which we wanted," but they "did not show up" and testify at any of the three hearings before the District Court on their several petitions attacking the arbitration award.

In fact, the only representative of Petitioner who testified in an effort to set aside the arbitration award was Petitioner's attorney, Mr. Romero, who was examined by Petitioner's New York attorney, Mr. Korngold. However, as already demonstrated, even this testimony of Mr. Romero was totally discredited and impeached.

Just these few instances of not only "failing to reveal" by breaching stipulations to provide information, followed by a complete absence from hearings that prevented cross-examination of Petitioner, not only make dubious the wisdom of Petitioner's charging Respondents with "concealment," but provide a history of consistent conduct that is best explained and interpreted by the familiar proverb:

"The guilty flee when no man pursueth,
While the innocent are as bold as a lion."

This judgment is especially justified when it is remembered that Petitioner requested to open the arbitration hearing by calling Respondent Samford's General Manager as an adverse witness and cross-examined the Samford personnel for hours. Also important, Sam-

ford had voluntarily answered discovery interrogatories propounded by Petitioner before the arbitration. The record explains this in detail:

> ". . . Commonwealth Coatings introduced the case, they *called Samford's vice president* and general manager, Mr. Dickinson, *as an adverse witness,* to start the case. Before the case started they filed a list of *discovery interrogatories* with the Board of Arbitrators and the Board of Arbitrators required Samford to answer all these interrogatories which provided the basis of proof.
>
> "Following that, they called as their first witness, Samford people. *They cross examined for hours.* They put their own proof on for hours." A. 98. (Emphasis added.)

## Violation Of The Letter and Spirit Of Solemn Stipulations

Petitioner's designated arbitrator, attorney Mr. Martinez, described the arbitration hearings:

> ". . . they were lengthy hearings and were held most of the time during the week ends, and particularly that long week end, Labor Day, we worked Saturday, Sunday, Monday and so we were all tired . . .
>
> ". . . the week end had already gone and everything had been lost so far as my family and I guess the rest of the members were concerned.
>
> "The Court: So it was the 'Lost Week End'?
>
> "A. A lost week end. There wasn't anything further to lose and it was a case that we could have stayed longer if the parties had chosen to or asked us to." A. 160.

As an accommodation to the parties who were busy,

the arbitrators conducted hearings on Saturday, Sunday, and a holiday, Labor Day. Petitioner's officers, Mr. Stein and Mr. Marcus, were anxious for the arbitration to be concluded so that they could return to New York. A. 94.

The parties and their attorneys expressly stipulated and requested the arbitrators to expedite the conclusion and to conduct the hearings on all of these days.

During the hearings, Petitioner admitted this, for example:

> "Mr. Romero: . . . we must admit and will admit that it was stipulated by the parties that the hearings could be held on Sunday." A. 90.

Even though Petitioner's owners and officers, Mr. Marcus, President, of New York; Mr. Nieto, Vice President and General Manager, of Puerto Rico; and Mr. Stein, Secretary, of New York, together with their attorney, Mr. Romero, expressly stipulated, participated therein, and induced the arbitrators and Respondent Samford to believe all of them would, by law, morality and honor of agreements so solemnly made and relied upon, be forever estopped through simple honesty, fair dealing, and honorable motivation to accept the results of arbitration according to rules made and agreed to by Petitioner, Petitioner nevertheless shockingly charged that the arbitration was illegal and unlawful and the award null and void because hearings were held on Sundays and Labor Day. (See February 5, 1964 Motion to Vacate Award filed by Petitioner's Attorney, Mr. Romero, (A. 39); the sworn February 1, 1964 Petition to Vacate Award by Petitioner's President, Mr. Marcus, (A. 52); May 6, 1965 Motion to Vacate Arbitration Award filed by Petitioner's Attorney, Mr. Romero, (A. 56); and

May 6, 1965 Petition to Vacate Award by Petitioner's Secretary, Mr. Stein, (A. 60).

Even more shocking and surprising was the effort by all of these owners and representatives of Petitioner to repudiate and dishonor the solemn stipulation and agreement made in open arbitration hearings which "expressly waived all time limitation requirements for the Board to make a determination and award and expressly agreed that no time limitations or restriction would apply or limit the Board's authority." A. 33.

The conduct and character of Petitioner as displayed by the following excerpts from the record are most relevant as the Court evaluates credibility of the parties, reviews the judgment of the District Court, and determines ". . . who is proper and who is improper, if anyone . . ." A. 80.

> "Mr. Currie: With reference to the thirty days we would submit this Court had already ruled when it granted the stay of the surety cases, the two cases against the sureties, this Court ruled that the stay was warranted and mandatory because of the Federal Arbitration Act and in at least two or three places in the pleadings of Commonwealth, they have stated that this Court has jurisdiction to review this award because it is under the Federal Arbitration Act.
>
> "One, the Federal Arbitration Act preempts the (14) feel [*sic*—field and] that there is no thirty day requirement there [as there is in the Puerto Rico Arbitration Act] and that's no ground for challenging the award under the proceeding in which this arbitration was conducted.
>
> "Two, Mr. Romero and all the parties *in the presence of Commonwealth Coatings' owners,* when Mr.

Marcus, Mr. Stein and Mr. Nieto, owners of Commonwealth were sitting in the room and when the question came up regarding when must the arbitrators decide and must we have a written stipulation to extend it beyond thirty days, *Mr. Romero stated such was not necessary,* no writing was required as *we stipulated in open arbitration.*

"Mr. Hector Martinez agreed with that and then Mr. Ramirez acquiesced and agreed.

"Mr. Romero: *I admitted that already.*

"The Court: He admits that. *He says it is his client* that does not want them to withdraw that claim." A. 94-95. (Emphasis added.)

The background for the Court's response to the admission of Mr. Romero is further recorded, and is more revealing, and seriously condemning of Petitioner:

"[Mr. Romero]: Then, Your Honor, we have also alleged by the supplemental motion, that these hearings were held Sunday contrary to law. As to that we must admit and will admit that it was *stipulated* by the parties that the hearings could be held on Sunday. It is also alleged in the supplemental motion —

"The Court: We have no blue sky laws.

"Mr. Romero: Also that the award took over thirty days and there wasn't a signed stipulation that the award be entered after thirty days, but there was an oral *stipulation.*

"The Court: *So you are withdrawing that charge?*

"Mr. Romero: *The supplemental motion was filed by the client himself. I am not withdrawing it.*

"The Court: *Why don't you ask your client for permission to withdraw it?*

"Mr. Romero: *They don't want the allegation withdrawn,* because *even though it was agreed to verbally,* the law does not permit this to be agreed to verbally.

"The Court: *That's Commonwealth Coatings.*" A. 90. (Emphasis added.)

The record reveals that each of the motions and petitions to annul and vacate the award, filed separately by Mr. Romero, Mr. Steih, and Mr. Marcus, each declared the award was illegal and void because not rendered within thirty days. However, none of these four pleadings challenging the award had the candor and fairness to recite and reveal that Petitioner was the party inducing the stipulation to waive the requirement of the Puerto Rican Arbitration Act that a final award be rendered within thirty days of the hearing. A. 39, 52, 56, 60.

**The Many "Credibility Gaps" of Petitioner**

The above self-impeaching and self-discrediting conduct of Petitioner and its representatives are sufficient to show the absence of clean hands, to destroy confidence and credibility in its pleadings and "proof," and to annul and warrant dismissal of its exaggerated, unjustified and unfounded attacks on the arbitration process and award. However, a summary view of a few of the many other self-betraying activities of Petitioner are outlined below:

1. Though the discredited pleadings charged partiality, all evidence and the many judicial stipulations and admissions made by Petitioner to the District Court expressly denied such, for example:

"[Mr. Romero:] Now, we don't mean to say that we believe that the chairman acted improperly in any way . . ." A. 75.

> "[Mr. Korngold, New York counsel for Petitioner]: I would like the record clear that at no time is Mr. Romero or myself accusing any of the arbitrators with doing anything fraudulent." R. IV, 137 (2).

There were many other such formal judicial admissions and stipulations made to the federal trial judge which, without contradiction, warranted and required the finding of the District Court:

> "With respect to No. 3, alleged partiality, bias or fraud of one of the arbitrators, counsel for plaintiff disclaimed any imputation of bias, partiality, or fraud on the part of the arbitrator involved." A. 185.

2. Many of the allegations of the various Petitions and Motions of Petitioner to annul the award are contradicted and discredited by Petitioner's own evidence. For example, the sworn February 1, 1964 Petition filed by Petitioner's President, Mr. Marcus, states:

> "Petitioner did its utmost to obtain arbitration with Samford and was utterly stymied." A. 47.

As the official record of the arbitration proceedings reveal, it was not until after the federal court stayed Petitioner's lawsuits against Respondent Samford's sureties until the arbitration could be completed that Petitioner designated on March 25, 1963 an arbitrator who was willing to serve, attorney Aaron Holman, who thereafter died and was replaced by attorney Hector Martinez Munoz.

3. Though Petitioner claimed that United Painting and Marcus Decorating, other painting companies owned respectively by Messrs. Stein and Marcus, were "behind"

Petitioner and indemnifying Petitioner's obligations, and Respondent Samford should not be concerned about Petitioner's debts because Petitioner provided a surety bond. R. VI, 139 (4, 7, 8); A. 68, 130, 182. Petitioner has wrongfully failed and refused to pay any portion of the Court Reporter's charges, though Petitioner contracted for and engaged the court reporter (A. 98), and the arbitration award found that the parties had agreed that the court reporter's fees of $2,000.00 were reasonable and each should be assessed with and ordered to pay one-half thereof. A. 34. Equally bad is the default and the failure of Petitioner to pay any portion of the arbitration cost and arbitrators' fees which were reasonably fixed at $3,000.00 for each arbitrator, with each party ordered, pursuant to the subcontract agreement, to pay one-half thereof. A. 35, 130.

4. During the arbitration, Petitioner was so inconsistent that a document entitled "Abstract of Chart of Commonwealth Coatings Inconsistent Claims" analyzing the Petitioner's various bills and exhibits was submitted in evidence. R. VI, 139 (17).

5. The combined price for Petitioner's five subcontracts was $351,938.00. Before abandoning the work, Petitioner had been paid $209,502.49, leaving an unpaid balance for unfinished work of $142,435.51. The Arbitration Board found that Respondent Samford's reasonable expense to complete Petitioner's work was $158,307.86. Thus, after subtracting the unpaid balance, there was an award to Respondent Samford of $15,872.35. This is most significant, for the arbitration proceedings reveal that the total of Petitioner's bid for these five subcontracts "was approximately . . . . $100,000.00 less than the average bid cost" of the other bidders. R. VI, 139

(17). This provides an economic explanation why Petitioner was anxious to attempt to find some way to abandon the work. R. VI, 139 (17). This also explains Respondent Samford's concern about Petitioner's failure to pay materialmen for paint on the projects, which default according to Samford's testimony was already some $60,000.00. R. VI, 139 (7).

6. Petitioner, the only subcontractor to abandon its work on these projects, even though paid $209,502.49, left many claims and debts for the materials for the projects unpaid, contrary to the subcontract. (R. VI, 139 (7, 13, 14)), but worse ". . . Commonwealth made incorrect statements [to Samford] that payment to suppliers had been made." R. III, 116 (6, 7).

7. And of great importance:

> ". . . Commonwealth breached the subcontracts, not Samford by performing poorly and not in accordance with the subcontracts, doing such things as painting buildings the wrong color and failing to paint in the more difficult areas, such as behind the bushes, falling behind schedule, not having enough workmen on the jobs, not timely paying their suppliers as required by the subcontract, and finally completely abandoning the work on all five projects." R. III, 116 (6)."

## The Ultimate Issue And The Ultimate Credibility Gap

Petitioner made two additional attacks on the arbitration award in their discredited pleadings, statements and testimony of Petitioner's attorney, Mr. Romero, namely that Mr. Capacete "never disclosed to Petitioner" the prior business relationship with Samford

and that the Board of Arbitration over Mr. Romero's objection allowed Respondent Samford to introduce evidence on the last day without giving Petitioner the right to examine or rebut the evidence.

Respondent's sworn pleadings denied that the terminated prior and unrelated testing services rendered by Mr. Capacete's firm disqualified him or affected the validity of the award, denied all allegations of fraud, and charged that Mr. Capacete "was totally fair and impartial in conducting the arbitration proceedings," and that Petitioner "before the arbitration proceedings and in any event before the Award of the arbitrators knew and should have known of the previous professional services rendered . . ." by Mr. Capacete's firm as an independent contractor. A. 65-66. Respondent also denied all allegations regarding any prejudicial error committed by the arbitrators in the admission of evidence in conducting the arbitration hearings. A. 69.

In none of the three separate hearings before the federal trial judge on the motions and petitions of Petitioner to vacate the award did the Petitioner or anyone introduce any evidence that Mr. Capacete had been guilty of fraud, partiality or other misconduct, but to the contrary, there were many and continual judicial stipulations and admissions, made in open court to the trial judge, that such had not occurred, that such was not even charged and, in fact, Mr. Capacete was not guilty of any such misconduct.

The record reveals that during the hearings the District Court would consider various issues and that Respondents, from time to time, indicated the desire to present sworn proof and testimony establishing there

was no impropriety in the selection of the arbitrators and that Petitioner "knew or should have known that Mr. Capacete had done some minor work." A. 80, 81, 82.

However, the District Court, apparently relying upon the judicial stipulations and admissions disclaiming "any imputation of bias, partiality or fraud on the part of the arbitrator involved" (A. 185), and believed that Petitioner was no longer relying upon this allegation in its effort to vacate the award, but rather relying upon the single issue raised by Petitioner's claim that the arbitrators on the last day of the hearing admitted evidence over Petitioner's objection without giving Petitioner the opportunity to examine and rebut such evidence. Such became the understanding of the third and final hearing on February 14, 1966 before the District Court.

Respondents had brought all exhibits that were introduced in the arbitration trial and had the three arbitrators present (A. 93) to establish that the Board had relied upon Petitioner's designated arbitrator, a lawyer, for legal advice (A. 92, 144, 155, 157) and that Petitioner had not objected to the evidence and had not requested additional opportunity to examine the documents, extend the hearings, or cross examine Respondent Samford, but in fact had breached the stipulation to meet at eight o'clock in the morning on the last day of the hearing to mutually inspect and examine the very evidence and documents Petitioner complained it had no opportunity to inspect.

**The Only Issue**

"The Court: That still does not answer *Mr. Romero's allegation that they were deprived of examining those documents,* of the necessary time to come to the Arbitration Board with evidence to rebut those documents or explain those documents. That's what he says, and *that's what the Court is interested in.*

"Mr. Currie: We would respectfully disagree. We state there was ample and total opportunity. There was no objection, no request for additional time, and they did have full privilege to examine everything and cross (20) examine and we are ready to submit proof and if that's *the only issue before the Court I will not address myself further.*

"The Court: *I believe that's the only issue at this hearing.*

"Mr. Romero: If that's *the only issue* the Court will hear I will change my order and call as my first witness Mr. Dwight Chapman." A. 98-99. (Emphasis added.)

The three arbitrators then testified and established that Petitioner had made no objection, made no request for additional time, and Petitioner had ample opportunity to examine and rebut the documents and conduct cross examination. The testimony of the attorney designated by Petitioner as arbitrator, Mr. Martinez Munoz, clearly establishes not only arbitration due process, but that even under technical legal rules of procedure, Petitioner had been afforded a fair hearing and complete procedural due process. A. 153-163.

Mr. Romero's sworn testimony claimed otherwise and in his statements to the Court said, *"So it is a matter of credibility."* A. 178. (Emphasis added.)

The Federal Judge stated, ". . . there have been no charges as to the honesty, ability, or anything like that . . ." of the arbitrators. A. 174. Later, the Court added ". . . *the only question pending*" (A. 175) (emphasis added), involved Petitioner's claim of lack of opportunity to examine the documents and rebut them.

Thereafter, the District Court again stated that this was *"The only issue that is important to me . . ."* A. 177. (Emphasis added.) The District Court and the attorneys for both sides agreed to cause the arbitration hearing record made on the tape recorder to be transcribed so the court could resolve the disputed testimony, the "credibility" issue, and know whether or not Petitioner had objected or been denied the right of examination and cross examination. A. 178-179.

With this understanding and agreement between the court and the parties, the court announced:

> "The Court: If the tape recorder supports your case then I am going to rule that the award be sent back to the arbitrators." A. 179.

". . . it is almost five o'clock" (A. 179), the hearing by its understood nature and evolved purpose had come to its end and dealt with the only issue before the District Court. Mr. Korngold, Petitioner's New York attorney, now knowing that the very voices from the arbitration hearing would be transcribed and that the "So it is a matter of credibility" (A. 178) proposition made by Mr. Romero could well be lost, was surprised and, contrary to the whole tenor and understanding of what was the remaining issue relied upon by the Petitioner, namely Petitioner's claim that it had objected and been

denied the right of examining the documents and cross examining, then stated as follows:

*"Mr. Korngold: I have one other issue.*

"The Court: And where it appears that Mr. Romero objected, what was the ruling, what happened, and of course Mr. Romero will read that and if he is not satisfied, he may have the tape played back so he may be sure that what the reporter has transcribed is the truth of what appears on the tapes and then on that basis I will rule on that question and then you may be able to cite this other case and if I am wrong in any of the rulings I have made there is still time for me to correct any such rulings, but at this time I don't believe that we will gain anything by hearing the cases you are going to cite.

"Mr. Korngold: It is on a completely different point, Your Honor.

*"The Court: Why did you not raise that different point when I said the only issue here is this?"* A. 179, 180. (Emphasis added.)

Respondent respectfully submits that this is another example of Petitioner's violation of the letter and spirit of the understanding of what was "the issue before the Court." Respondent had relied on this understanding in its presentation of proof and examination of witnesses. However, notwithstanding this further disappointing departure of Petitioner from the understanding, the record and evidence, under the law, demonstrate that Petitioner's appeal is without merit in law or facts and that the judgment of the District Court upholding the award should be sustained.

The manifest correctness of this conclusion was espe-

cially affirmed when the District Court, after reading the transcript of the arbitration hearing tapes, found that Petitioner had made no objection to the admission of the exhibits and had not requested any time extension, as had been claimed by Petitioner. A. 185.

## CONCLUSION

Respondents respectfully submit that the findings of fact and judgments of law as reflected in the following paragraph from the District Court's opinion sustaining the award are manifestly correct:

> "With respect to No. 3, alleged partiality, bias or fraud of one of the arbitrators, counsel for plaintiff disclaimed any imputation of bias, partiality, or fraud on the part of the arbitrator involved. He seeks to overthrow the award on the ground that Samford should have informed plaintiff that the engineering firm with which the arbitrator involved (who had been selected by the two arbitrators designated by the parties) was connected had in the past done work for Samford. In view of the fact that, not only has plaintiff failed to offer any evidence showing "evident partiality" in said arbitrator (9 U.S.C. Sec. 10(b)), it also has expressly disclaimed any such imputation, this objection to the award must be, and is hereby overruled. See: *Ilios Shipping and Trading Corp., S.A., Petitioner, and American Anthracite & Bituminous Coal Corp., Respondent,* 148 F.Supp. 698, and cases cited therein." A. 185.

This finding of fact and judgment is manifestly correct and required because:

1. Throughout the trial and hearing, Petitioner's attorneys, both from Puerto Rico and New York, did continually make many judicial admissions and stipulations that "disclaimed any imputation of bias, partiality or fraud on the part of the arbitrator involved." For example, Petitioner's attorney stated, "Now, we don't mean to say that we believe that the chairman acted improperly in any way. . . ." A. 75.

Petitioner's effort ". . . to overthrow the award on the ground that Samford should have informed Plaintiff [Petitioner] that the engineering firm with which the arbitrator involved was connected had in the past done work for Samford" (A. 185) is a finding that was judicially admitted by Petitioner's Puerto Rico and New York counsel when, during the hearing, they told the Court:

> "Mr. Romero: Just one thing, this isn't an allegation of fraud against the arbitrators, but against Samford Company. They failed to disclose certain business relations with one of the arbitrators.
>
> Mr. Korngold: (Argued). Could we have the minutes taken? I would like the record clear that at no time is Mr. Romero or myself accusing any of the arbitrators with doing anything fraudulent. If the arbitrators are not told what their duties are by the people who select them, then they are not in fraud. They are innocent babes in the woods sometimes, and they were used, they may look that they have done something wrong. . ." R. IV, 137 (2, 3).

2. This alleged charge against Respondent Samford is without factual or legal merit because the court found,

> ". . . not only has plaintiff failed to offer any evidence showing "evident partiality" in said arbitrator (9 U.S.C. Sec. 10 (b)), it also has expressly disclaimed any such imputation, this objection to the award must be, and is hereby overruled." A. 85.

3. The evidence and allegations regarding the past, unrelated and remote testing services rendered a year or more before the arbitration established that Mr. Capacete was never the employee or agent of Respondent Samford, that such services were those of his firm

as an independent contractor performed on an occasional and isolated basis for the customary charges, and were in no way connected with, but completely terminated a year or more before the arbitration and thus such past relationship, because it was remote, insubstantial, unrelated and otherwise because of its nature as described in the record, does not constitute a disqualifying relationship, and the circumstances surrounding the past and terminated relationship do not establish evident partiality.

4. The arbitration agreement between the parties did not by its terms or references to other arbitration rules require either an arbitrator or either party to voluntarily disclose unsolicited information regarding such past, terminated and unrelated business connections.

5. Unless the parties otherwise agree, the law imposes no duty upon one party to voluntarily disclose unsolicited information regarding the qualifications of judges, jurors, or arbitrators, or such past, terminated, and unrelated business connections.

6. Such past, terminated and unrelated business relationships do not disqualify a judge, juror, or arbitrator. Even if Mr. Capacete were held to the strict standards imposed on a federal judge, he would still not have such an interest here as would disqualify him, for a judge is not disqualified by an interest that is past, not present; nor is a federal judge whose interest is insubstantial required to disqualify himself. Here, Mr. Capacete had no present interest in the outcome of the arbitration, all business relationships with any parties having ceased a year or more earlier. Also, the business relationship was never other than insubstantial, being less than a small

fraction of 1% of the incomes of the firms in which he had an interest.

7. The past relationship that existed between Mr. Capacete's firm and Respondent Samford would not have disqualified a juror. Failure to exercise due diligence in ascertaining the qualifications and failure to object at the time a juror is selected, constitutes a conclusive waiver if the basis of the objection is known or might have been known or discovered through the exercise of reasonable diligence, or the party is otherwise chargeable with knowledge of the grounds of the objection. The public policy for this rule is especially applicable to arbitration since the parties are free to prescribe the rules of selecting arbitrators, inquire about and waive disqualifications, and if disqualifications are alleged and not waived, to seek the removal of the alleged disqualified arbitrator by an action in equity before the arbitration hearings commence.

8. The volume and significance of Respondent Samford's construction business and Mr. Capacete's firm's engineering and testing services for the construction industry on the island of Puerto Rico which is only about 100 miles long and about 35 miles wide, were such that the Petitioner as a painting contractor, because of the magnitude and volume of its construction activities in Puerto Rico and the volume of business and construction contacts with Respondent Samford, necessarily knew or reasonably should have known of the past business relationship between these firms or probability of such relationship, that thus, Petitioner, under the law and facts, had actual or constructive knowledge of the past relationships. This conclu-

sion is especially warranted in this case because of the close personal friendship, relationship and contacts between Petitioner's attorney and Mr. Capacete, including knowledge of Mr. Capacete's business. It is further justified because Petitioner, a large and experienced painting contractor, knew or should have known that the testing services for sand and concrete, both heavy materials, and tests for soil compactions were, with almost predictable certainty, performed by a Puerto Rican testing firm such as Mr. Capacete's rather than by the uneconomic shipping of such heavy materials from the island or having other experts travel to Puerto Rico to make such tests.

9. Petitioner, with its many able Puerto Rican and New York attorneys, and experienced construction management, voluntarily elected not to inquire of the arbitrator or its adversary or to conduct such reasonable investigation that would have revealed the past and unrelated testing services performed by Mr. Capacete's firm for Respondent Samford. Thus, Petitioner is deemed to have known or have had constructive knowledge of all facts it desired to know to select and authorize Mr. Capacete to serve as arbitrator and, in failing to exercise reasonable diligence and to make reasonable inquiry, is deemed to have conclusively waived any objection that was known or might have been known or discovered through the exercise of reasonable diligence.

10. Petitioner demonstrated a total lack of ordinary diligence and due care. Both parties and Mr. Capacete were located in the San Juan area. All were professionally involved in the construction industry. Petitioner's attorney and Mr. Capacete were close friends, and there

was continuous and easy opportunity by telephone, letter, or otherwise to inquire of Respondent Samford, Mr. Capacete, or others knowing of the past relationships. In particular, there was lack of due diligence, resulting constructive knowledge and waiver, since the record reveals personal contacts and conversations between Petitioner's attorney, Mr. Romero, and Mr. Capacete (A. 145), when Mr. Romero conferred with Mr. Capacete seeking the names of lawyers who might replace Mr. Holman as arbitrator. Also, easy inquiry could have been made at the pre-trial hearing conducted prior to the arbitration hearing of testimony. All parties and arbitrators were present at the pre-trials. A. 88. Petitioner could easily have included such inquiry in the questions of its pre-hearing discovery interrogatories. A. 98. Neither did the Petitioner make such inquiry in the many letters and communications exchanged between the parties. Since ordinary diligence and easy inquiry would have revealed the past relationships, knowledge thereof is imputed to Petitioner.

11. Petitioner has waived any duty (which Respondents deny exists) of Mr. Capacete to inform Petitioner of the past and terminated business relationships between his firm and Respondent Samford because it was stipulated and judicially admitted that Mr. Capacete did not act "improperly in any way," but rather Petitioner attempted to "excuse" itself and to "place" a duty on its adversary to reveal such past, terminated and insubstantial relationships which under law are not disqualifying. The law imposes no such duty upon the adversary, but rather requires the complaining party to exercise due diligence in learning and asking and seeking information

regarding qualifications, objections to which it does not wish to waive.

12. Petitioner waived any objection it might have made to Mr. Capacete not only when he was originally selected and allowed to serve as arbitrator, but when the Petitioner with knowledge of the past relationship submitted to Mr. Capacete and the same Arbitration Board Petitioner's request for further and additional reconsideration of its award, A. 129, 131; R. V, 138 (35).

13. Not only were the past business relations terminated, but there was no possibility that future business relations would occur between Mr. Capacete and Respondent Samford.

> "Samford had not contracted for major projects in Puerto Rico for some two or three years before the arbitration hearing and was at that time arranging to close such operations in Puerto Rico." R. III, 116 (6).

14. The facts, the issues, the circumstances, the procedures, and the findings and the award of the Arbitration Board in no way suggest bias, fraud, partiality or misconduct in the proceedings and therefore do not support a finding of "evident partiality," but demonstrate that a finding of "evident partiality" would be unfounded, unwarranted, and contrary to the undisputed evidence which caused the District Court to find and state,

> "In closing, I wish to state that the record shows that the arbitrators conducted fair, impartial hearings; that they reached a proper determination of the issues before them. . ." A. 185.

Accordingly, Respondents respectfully conclude (a)

that the arbitrators were not required to have had no previous business relationship whatsoever with any party to be eligible to participate as arbitrators; (b) that Mr. Capacete and Respondents were not required to volunteer unsolicited information concerning the previous business relations between Samford and Foundation Engineering Company, especially since no one at the time of the arbitration proceedings or since has made any allegation that Mr. Capacete was actually anything other than totally fair and impartial in carrying out his duties as an arbitrator; (c) that Petitioner's failure to show, or even allege, any adverse effect on the arbitration proceedings or on the award caused by the purely isolated, casual, insubstantial and past business transactions which had occurred from time to time with Samford indicates that Petitioner's objection is wholly theoretical and technical in nature; (d) that in any event, Foundation Engineering Company's relationship with Samford was totally remote and insignificant and had been terminated, and Mr. Capacete's relationship was even less significant, Mr. Capacete being only a part owner of the firm and personally involved in only a small portion of the services; and (e) that if Petitioner had any right to object to Mr. Capacete, which is denied, it waived such right by its failure to inquire or object while having knowledge of facts as a subcontractor sufficient to cause Petitioner to conclude that Foundation Engineering Company and Respondent Samford may have had previous business relations since they were both engaged in related businesses and were both prominent in their respective fields.

For these reasons, the exhaustive effort of all concerned to resolve this dispute that included ten days of hearings, a multitude of exhibits, lengthy briefs filed

by both parties, tremendous expense, and the services of three well-known and highly qualified professional men as arbitrators should not now be totally undone upon the basis of the highly technical legal theory asserted by Petitioner unsupported by any relevant legal authority or any persuasive public policy.

Arbitration is a proceeding that is supposed to be informal and without unnecessary pitfalls for reversible error. The Second Circuit has stated,

> "It goes without saying that there should be great hesitation in upsetting an arbitration award. The award . . . must stand unless it is made abundantly clear that it was obtained through corruption, fraud, or undue means." *Karppinen, supra,* 187 F.2d 32, 34.

There has been not even an allegation of actual "corruption, fraud or undue means" in the rendering of the arbitration award. Surely, it would be an empty, costly and unwarranted burden to cause a rehearing of this dispute when there is a virtual admission that the result should again be the same.

Petitioner has argued in the District Court that the award was void because it was issued more than thirty days after the close of the hearings (A. 184), although Petitioner had expressly agreed to allow the arbitrators all the time they required for decision (A. 33). Petitioner had argued the award was void because of the holding of hearings on Sundays and a holiday (A. 184), although it had desired and agreed to this scheduling of hearings (A. 67-68). Likewise, Petitioner now argues the award should be vacated although it does not even claim that the arbitrators, the arbitration proceedings or the award were actually affected in any way by the circumstances

now complained about. The only conclusion that can be drawn, as was drawn by the District Court (A. 185-186), is that this is,

> "... a situation where the losing party to an arbitration is now clutching at straws in an attempt to avoid the results of the arbitration to which it became a party [Quoting from *Ilios Shipping, supra,* 148 F.Supp. 698, 700]."

It is therefore respectfully submitted that the decision of the Court of Appeals should be affirmed, thereby confirming the award of the Board of Arbitration, with costs assessed against Petitioner.

This 13th day of June 1968.

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